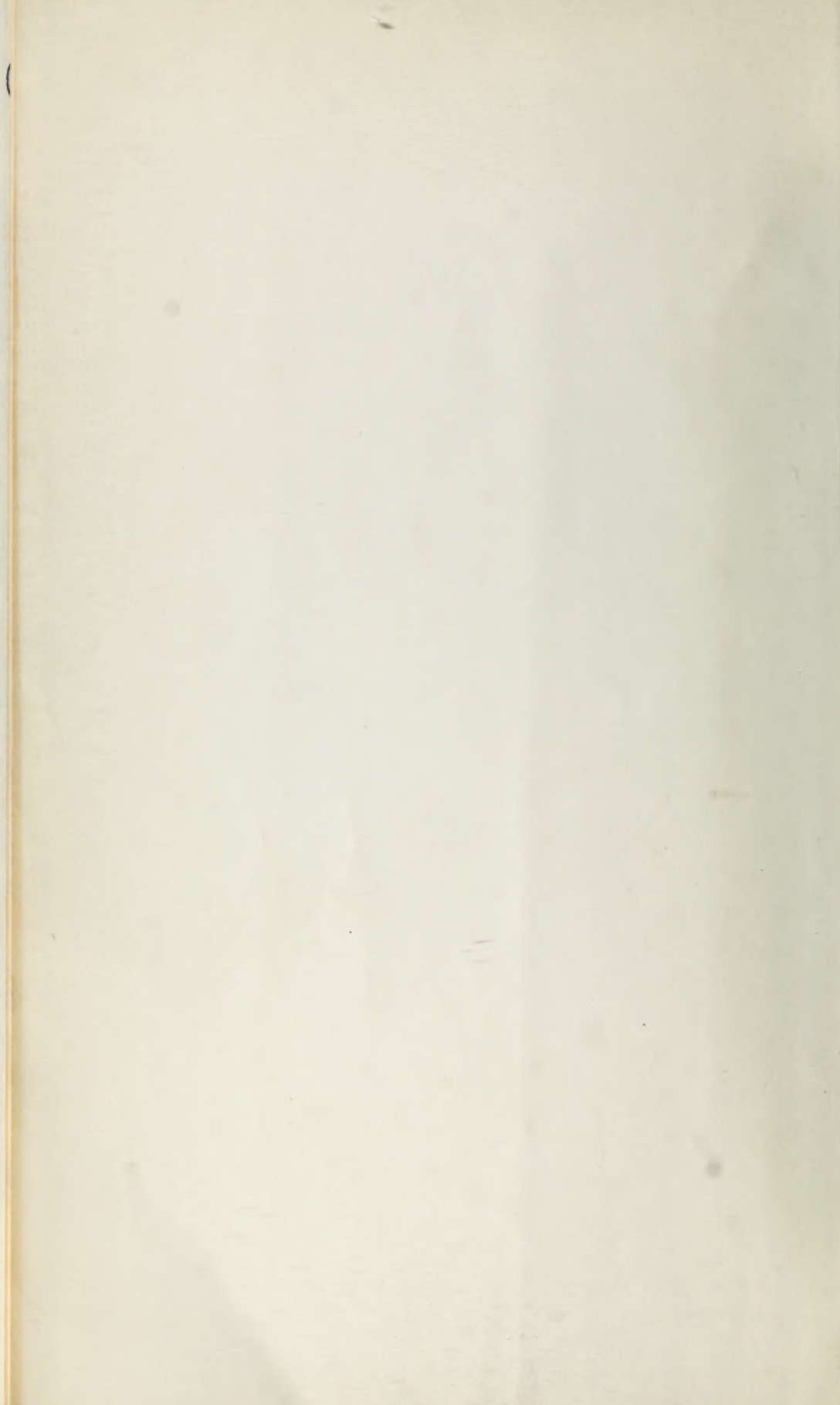


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March Term, 1912, No.
73 - 18097.

*William R. Brand, for
plaintiffs in error.* ^{2/63}₃₉

NICHOLAS J. MANN,
Defendant in Error,

ERROR TO

Vol 182

vs.

MUNICIPAL COURT

HENRY BROWN, et al.,
Plaintiffs in Error.

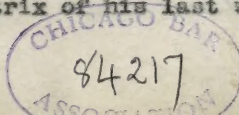
OF CHICAGO.

*Vincent D. Hyman and Otto H.
Jurgens, for defendant in error*

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

182 I.A. 1

Defendant in error brought suit against plaintiffs in error in the Municipal Court for \$2,000, alleged to be due him upon a breach of a supersedeas bond. The copy of the bond attached to the statement of claim recites that whereas, by a decree entered in the Superior Court in October, 1907, Thomas and Elizabeth Brown were ordered to pay "certain judgments of law and also sums of money found by said decree to be due", and said Browns appealed to the Appellate Court, where the decree was affirmed and judgment rendered against them for costs, from which judgment they sued out a writ of error from the Supreme Court and the same was made a supersedeas, "Now, therefore, if said Thomas Brown and Elizabeth Brown shall duly prosecute their said writ of error with effect, and moreover, pay the amounts so decreed to be paid by them as aforesaid * * * in case the said decree shall be affirmed in said Supreme Court, then the above obligation to be void", etc. The plaintiff's verified statement of claim alleges that the Supreme Court affirmed the decree mentioned in the supersedeas bond in December, 1909; that the judgments mentioned in the supersedeas bond and in the decree were two judgments against Thomas Brown, one in favor of Nicholas J. Mann, for \$799.50 and costs, from which \$25 was remitted, and the other in favor of Jacob Huber for \$2650 and costs, from which \$25 was remitted; that Jacob Huber died and the judgment in his favor was assigned by the executrix of his last will and testament to



Rehearing ordered 7/14/13
on rehearing 7/18/13
7/18/13

NICHOLAS J. KAHN,
Defendant in Error,
vs.
MUNICIPAL COURT,
OF CHICAGO.

1321A.1
Defendant in error brought suit against plaintiff in

error in the Municipal Court for \$8,000, alleged to be due him upon a promissory note of a supersedeas bond. The copy of the bond attached to the statement of claim recites that whereas, by a decree entered in the Superior Court in October, 1907, Thomas and Elizabeth Brown were ordered to pay "certain judgments of law and also sums of money found by said decree to be due"; and said Brown appealed to the Appellate Court, where the decree was affirmed and judgment rendered against them for costs, from which judgment they sued out a writ of error from the Supreme Court and the same was made a supersedeas. "Now, therefore, it is said Thomas Brown and Elizabeth Brown shall daily prosecute their said writ of error with effect, and moreover, pay the amounts so decreed to be paid by them as aforesaid - a - in case the said decree shall be affirmed in said Supreme Court, then the above obligation to be void," etc. The plaintiff's verified statement of claim alleges that the Supreme Court affirmed the decree mentioned in the supersedeas bond in December, 1909; that the judgment mentioned in the supersedeas bond and in the decree were two judgments against Thomas Brown, one in favor of Nicholas J. Kahn, for \$750.00 and costs, from which \$25 was resiled, and the other in favor of Jacob Haber for \$625.00 and costs, from which \$25 was resiled; that Jacob Haber died and the judgment in his favor was assigned by the executor of his last will and testament to

CHICAGO BAR
84217
ASSOCIATION

Nicholas J. Mann; that Thomas Brown is entitled to a credit of \$1200 upon said judgments "by reason of said amount having been included in a decree of foreclosure sale", but that defendants are entitled to no other credits thereon and that there is now due upon said judgments "the sum of, to-wit: \$2227", together with interest at five per cent. per annum from November 3, 1897. Plaintiffs in error, who were the sureties on the supersedeas bond, were served with summons and entered their written appearance in the Municipal Court and at the same time filed a written demand for a trial by jury. An affidavit of merits was also filed, which, on motion, was stricken from the files. A second, third, fourth and fifth affidavit of merits were filed and each in succession was stricken from the files. After the last of these affidavits was stricken a default was entered for want of an affidavit of merits, and thereupon the court, without calling a jury, entered an order finding that "there is due to the plaintiff the sum of money shown in said affidavit of claim to be due", and assessing plaintiff's damages at the sum of \$2000, and thereupon entered judgment upon the finding against plaintiffs in error for that amount.

After examining the several affidavits which were thus stricken from the files, we think there was no error in that respect in the action of the trial court. All of the affidavits are ambiguous and evasive. Plaintiffs in error evidently had ample opportunity to specify by a proper affidavit of merits the "nature of their defense", but failed to do so, although it would appear from the briefs of their counsel filed in this court that they may have had a meritorious defense to some part, if not all, of the plaintiff's claim. For a failure to state the nature of such defense we think a default was properly entered against them. But the default of a defendant for failure to file a sufficient affidavit of merits does not admit the amount of plaintiff's damages.

Nicholas J. Mann; that Thomas Brown is entitled to a credit of \$1000 upon said judgment "by reason of said amount having been included in a decree of foreclosure sale", but that defendant was entitled to no other credits thereon and that there is now due upon said judgment "the sum of, to-wit: \$2237", together with interest at five per cent. per annum from November 3, 1937. Plain- tiff in error, who were the appellees on the supersedeas bond, were served with summons and entered their written appearance in the Municipal Court and at the same time filed a written demand for a trial by jury. An affidavit of merits was also filed, which, on motion, was stricken from the files. A second, third, fourth and fifth affidavit of merits were filed and each in succession was stricken from the files. After the last of these affidavits was stricken a default was entered for want of an affidavit of merits, and thereupon the court, without calling a jury, entered an order finding that "there is due to the plaintiff the sum of money shown in said affidavit of claim to be due", and assessing plaintiff's damages at the sum of \$2000, and thereupon entered judgment upon the finding against plaintiff in error for that amount.

After examining the several affidavits which were thus stricken from the files, we think there was no error in that respect in the action of the trial court. All of the affidavits are ambiguous and evasive. Plaintiff in error evidently had ample opportunity to specify by a proper affidavit of merits the "nature of their defense", but failed to do so, although it would appear from the briefs of their counsel filed in this court that they may have had a meritorious defense to some part, if not all, of the plaintiff's claim. For a failure to state the nature of such defense we think a default was properly entered against them and the default of a defendant for failure to file a sufficient affidavit of merits does not affect the amount of plaintiff's damages.

Plaff v. Pacific Express Co., 251 Ill. 243, 247. Even after a default is entered for want of a plea or affidavit of merits, a defendant has the right to cross-examine the plaintiff's witnesses as to the amount of damages sustained, to introduce evidence in his own behalf as to damages, to ask for instructions upon that question, and to preserve his rights for review by a bill of exceptions. Plaff v. Pacific Express Co. supra; Cairo & S.L.R. Co. v. Holbrook, 72 Ill. 419; American Mail Order Co. v. Marsh, 116 Ill. App. 248.

Section 30 of the Municipal Court Act provides that all cases of the first and fourth classes "shall be tried by the court without a jury unless the plaintiff, at the time he commences his suit, or the defendant, at the time he enters his appearance, shall file with the clerk a demand in writing of a trial by jury, which demand, however, may be withdrawn by the party filing the same at any time before the trial". As above stated, the defendants filed with their appearance a written demand for a jury trial, and the record does not show that said demand was withdrawn at any time. After judgment, the defendants moved to vacate the judgment upon the ground "that the court erred in failure to submit the issues in this cause to a jury". With this motion they filed an affidavit setting up in substance that the plaintiff had received from certain property belonging to Thomas Brown the sum of \$4486.75 as rent, and that said property was foreclosed and sold for \$4400, which sums aggregate more than the total amount due upon said judgments. The motion to vacate was overruled, however, and upon this writ of error the principal error assigned is that the court erred in failing to "submit the issues to a jury".

Section 59 of the Practice Act provides that "upon default * * * either party may have the damages assessed by a jury".

In Pinkel v. Domestic Sewing Machine Co., 89 Ill. 277, the court said of this section of the statute: "These words are imperative and are not open to construction. The defendant is entitled by law to have his damages assessed by a jury. When he demanded it, it was error to deny it". There is no provision in the Municipal Court Act which, either in terms or in effect, is at all similar to Section 50 of the Practice Act, unless Section 30 above quoted can be held to have an equivalent effect.

Section 20 of the Municipal Court Act provides that the judges of that court shall have power to adopt "in addition to or in lieu of the provisions herein contained prescribing the practice in said Municipal Court, or of any portion or portions of said provisions, such rules regulating the practice in said court as they may deem necessary or expedient for the proper administration of justice therein: Provided, however, that no such rule or rules so adopted shall be inconsistent with those expressly provided for by this Act". In pursuance of this section, the Municipal Court has adopted a number of rules. Rule 14 provides that "in all cases of the first class instituted in this court on and after April 1, 1910, the pleadings shall be the same as in cases of the fourth class". Rule 17 provides that "in first and fourth class cases for the recovery of money only the defendant shall file an affidavit sworn to by himself, his agent or attorney, stating that he verily believes the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and specifying the nature of such defense, whether by way of denial or by way of confession or avoidance in such a manner as to reasonably inform the plaintiff of the defense which will be interposed at the trial. * * * If the defendant fails to file an affidavit of merits such as is required by the rules of this court, the plaintiff shall be entitled to default and

judgment upon the plaintiff's affidavit of claim on file in said cause, or upon such further evidence as the court may require.

* * * Where the defendant files an appearance either with or without a demand for a jury trial, and fails to file with it at that time, or at such further time as the court may allow, an affidavit of merits, or where the defendant's affidavit of merits is stricken from the files for insufficiency, the court may then and there enter judgment as in case of default for the plaintiff upon the plaintiff's affidavit of claim in said cause, or such further evidence as the court may require".

By Rule 23 of the Municipal Court, the judges of that court formally adopted, by number, certain sections of the Practice Act as applicable to proceedings in that court. Section 59 of the Practice Act was not among the sections so adopted, but in lieu thereof, Rule 17 above quoted was adopted. The authority to adopt such a rule is expressly given by Section 20 of the Municipal Court Act, provided the rule so adopted is a rule "regulating the practice in said court", and provided the rule so adopted be not inconsistent with the provisions of the act itself. The only provision of the Act with which Rule 17 can be claimed to be in conflict is the provision in Section 30 preserving to the parties the right of trial by jury, if demanded in apt time in writing. The question then naturally arises: Is that part of a judicial proceeding in which the damages are assessed, after default, in any proper sense, a "trial"? The words "trial" and "jury trial" have been most frequently construed in discussing the constitutional provision that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate". In George v. The People, 167 Ill. 447, this provision was construed to mean "the right of trial by jury as it existed at common law". Blackstone says that at common law, upon default

of a defendant for want of a plea, an interlocutory judgment was entered "that the plaintiff ought to recover his damages (indefinitely)" and that thereupon a writ of inquiry to assess damages was issued. This writ was directed to the sheriff, and commanded him to summon a jury to assess damages. In the execution of the writ the sheriff sat as judge and tried before the jury summoned by him, the question "what damages the plaintiff hath really sustained". (Cooley's Blackstone Book III, p. 397.) The same authority also says that "when damages are to be recovered, a jury must be called in to assess them, unless the defendant, to save charges, will confess the whole damages laid in the declaration". Mr. Tidd, however, disagrees with this last statement. In his work on Practice (3rd Ed., Vol. 1, p. 576) that author, after describing at length the same common law practice of assessing damages upon default as outlined in Blackstone's Commentaries, adds the following explanation or qualification: "In general a writ of inquiry is awarded; but this is a mere inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages with the assent of the plaintiff, or direct them to be assessed by the proper officer". In Vanlandingham v. Fellows, et al., 1 Scam. 233, our Supreme Court repeated almost verbatim the qualification stated in Tidd's Practice, and said that "from this view of the common law, relative to writs of inquiry, it follows that it is not necessary to execute the writ in Court, unless expressly so directed by the Court, nor in term time, nor at the Court House. It, like other writs, may be executed at any place within the sheriff's bailiwick". The Vanlandingham case, supra, was followed in this respect as late as 1899, in Phoenix Insurance Co. v. Hedrick, 178 Ill. 212, where it was said, (p.217): "Assessment of damage is in no sense a trial. It is more in the nature of a

of a defendant for want of a trial, or incompetency to defend
was waived "that the plaintiff ought to prosecute his demand
(indemnity)" and that there was a right of recovery on account
damages was denied. This writ was directed to the sheriff, and
commanded him to summon a jury to assess damages. In the return
made to the writ the sheriff said he had summoned a jury but they
were removed by him, the plaintiff's counsel having been directed
to "twice remove" them. (Plaintiff's affidavit dated July 10, 1901.)
The court accordingly also says that "such damages are to be recovered
and a jury must be called in to assess them, without any adjournment,
to have charges, all matters the whole damages being in the
plaintiff's favor. Plaintiff's agreement with this last clause
waived. In his writ on Tuesday (July 10, 1901) the
court, after describing as faulty the jury return for previous
by assessing damages upon behalf of plaintiff in defendant's
removal, adds the following explanation of plaintiff's
"in general a writ of habeas corpus is necessary. But this is a writ
which is given to enforce the execution of the writ, and it
may extend over defendant's return and return with the return
of the plaintiff, or direct them to be assessed by the court
thereof. In proceedings on habeas corpus, it is said, the
return must be returned within the jurisdiction of the court
in which the writ is issued, and that this is the view of the court
last, relative to writs of habeas corpus, is taken that it is not
necessary to examine the writ in court, and no appearance is required
by the court, nor is any time set for the return of the writ.
This other writ, may be granted at any time after the writ
has been returned, and the court may, and it is said, it is
to this extent to have no effect, in proceedings on habeas corpus.
In this case, the writ was issued on July 10, 1901, and the
return was made on July 11, 1901, and the court said, it is
at least in no sense a trial, it is only a writ to be returned by a

special proceeding. Under the early common law in this State the sheriff was authorized to execute the writ of inquiry anywhere in the County, and the proceeding need not be in Court at all".

In Ross v. Irving, 14 Ill. 171, it was said: "Trial by jury is only required on issues of fact in civil and criminal cases in courts of justice, which is not understood to embrace a mere assessment of damages, or value, made out of court".

In Hopkins v. Ladd, 35 Ill. 178, an action of debt was brought on a replevin bond. The defendant demurred to the declaration, and on its being overruled, elected to stand by his demurrer. The court gave judgment for the amount of the penalty of the bond, and proceeded to assess the damages without a jury over the objection of defendant, who demanded a trial by jury. On appeal, the defendant contended that under the Practice Act then in force, which contained a provision similar to that in Section 99 of the present Practice Act, he was entitled to a jury trial upon the assessment of damages, notwithstanding his default. It appeared, however, that by a special act of the legislature, applicable to the particular court in which the case was tried, that court was authorized to assess damages without a jury in all cases of default; and the court held that the special act controlled instead of the general Practice Act. The court said: "This is a mere matter of practice, none will deny, and being so, the assessment of damages could be made by the court without a jury. The idea that a party has a constitutional right to have a trial by jury is not controverted. Here was no trial, in any sense of that term. The defendant has declined putting his case on trial by abiding the judgment on the demurrer. The inquiry afterwards involved no consideration of any right of the defendant. His position was fixed by the judgment on the demurrer; no

issue of fact was presented".

Under these decisions of our Supreme Court, it must be held that whether the damages shall be assessed by the court, or by a jury, after a default has been entered for want of a plea or affidavit of merits, is a matter of practice only; that in either case, there is no "trial" in the sense in which those words are used in Section 30 of the Municipal Court Act; that therefore the filing of a written demand for a jury trial as provided in that section, does not require that court to call a jury to assess damages after default where it has adopted a rule to the contrary; and that the court did not err in following its own rule of practice in this respect instead of Section 59 of the Practice Act.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

MR. JUSTICE GRIDLEY dissenting: Under the facts of this case, I am of the opinion that the plaintiffs in error were entitled to have the damages assessed by a jury, and that the judgment should be reversed and the cause remanded.

James M. Ford was present.

Robert Green mentioned to our subject matter, it was

the fact that during the session which he attended by the

event, or by a day, after a delay of two years and ten

years of a year or slightly of more, in a matter of years

this body, that the other body, there is no reason to the

reason in which these events are held in relation to the main

effect of the fact that the body of the body of the body

was for a long time in the body of the body of the body

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March Term, 1913, No.
207 - 19212

THE CITY OF CHICAGO,
Defendant in Error,

vs.

JOSEPH BIEL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT

OF CHICAGO.

Richard Donovan, for
Plaintiff in error.
William H. Sexton and
James S. McInerney, for
defendant in error; Albert J. M. Appel, of counsel.

MR. PRESIDING JUSTICE BAKER

DELIVERED THE OPINION OF THE COURT.

1821A.2

The bill of exceptions has been stricken from the record in this case. Two of the three assignments of error relate to matters shown only by the bill of exceptions, and in the absence of such a bill cannot be considered. The other assignment, that the Court erred in overruling the motion in arrest of judgment, is not argued in the brief for plaintiff in error and is therefore waived.

The judgment is affirmed.

AFFIRMED.

March 1911
1911 - 1912

THE STATE OF TEXAS,
COUNTY OF DALLAS,
SS. I, the undersigned, a Justice of the Peace in and for said County, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of said County.

WITNESSED MY HAND AND SEAL OF OFFICE, this 1st day of March, 1911.

JOHN W. HARRIS, Justice of the Peace.

The bill of exchange has been received from the
holder in full. The bill of exchange of value
contains no further check than of the bill of exchange, and in
the amount of \$1000 & will amount to be received. The other
amount, that the bank owes is received and the bill is
received of payment, is not signed in the bill for delivery
in full and is therefore valid.
The amount is allowed.

Witness my hand and seal of office, this 1st day of March, 1911.

3 - 18054

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

vs.

CHARLIE YOUNG,
Plaintiff in Error.

182 I.A. 3

ERROR TO MUNICIPAL COURT

OF CHICAGO.

*MacLachlan Byrne, for defendant
in error; Zach Hofheimer, of
counsel.*

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The plaintiff in error, Charlie Young, was convicted by a jury in the Municipal Court of Chicago of the offense charged in an information filed against him in said Court, under the Act in relation to Pandering approved June 1, 1908, as amended by an Act approved June 12, 1909. The information alleged that he wilfully and wrongfully procured one Nellie DeRitus, a female person, to become an inmate of a house of prostitution then and there located at No. 608 Federal street in the city of Chicago, Cook County, Illinois;

Also that by fraud and artifice he procured the said DeRitus to become an inmate of said house of ill fame;

Also that he then and there procured the said DeRitus to enter a place where prostitution is encouraged and allowed within this State, to-wit, said house at number 608 Federal street;

Also that he procured the said DeRitus to come into the State for the purpose of prostitution from the State of Michigan and practice prostitution at said house.

Motion to arrest judgment was overruled and Young was sentenced to confinement in the House of Correction for six months and to pay a fine of \$500. This writ of error was sued out to reverse the judgment, on the ground that the information does not set forth an offense.

The argument of counsel is that the procurement to become an inmate of a house of prostitution, in order to be a statutory offense, must be accompanied by promises, threats, violence, or by some device or scheme or by fraud or artifice or by duress of person or goods or by abuse of some position of confidence or authority.

Careful analysis of the statute does not bear this out. Omitting alternative clauses, the statute in question reads:

"Any person who shall procure a female inmate for a house of prostitution * * * or shall procure a place as inmate in a house of prostitution for a female person * * shall be guilty of pandering."

We think that under this provision of the statute, the information is sufficient in alleging that the defendant procured the said DeRitus to become an inmate of a house of prostitution. If, however, there is sufficient difference between the allegation that one has procured a female inmate for a house of prostitution or a place as inmate in a house of prostitution for a female person, and an allegation that one has procured a female person to become an inmate of a house of prostitution - to render this information bad on a motion to quash, which we doubt, we do not think it can be taken advantage of on a motion for arrest of judgment.

There can be no question that the defendant knew with reasonable certainty with what offense under the statute he was charged by the terms of the information. He chose not to question its sufficiency, but pleaded not guilty to it.

But even if this were not so, the information is sufficient under an alternative clause in the statute. It is a provision of the statute "that * * * any person who shall by fraud or artifice * * * procure any female person to become

The amount of reward is that the Government is
not an issue of a matter of procedure, in order to be a
subject matter, may be considered in various respects.
It is an issue of a matter of procedure, in order to be a
subject matter, may be considered in various respects.
It is an issue of a matter of procedure, in order to be a
subject matter, may be considered in various respects.

"and because the small number of people who are
able to do this work is so small, it is a
very important part of the economy."

in a nation for export of goods.

There can be no question that the defendant knew this
and was acting with intent to defraud the bank.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Intelligence Service in the United States.

an inmate of a house of ill fame * * * shall be guilty of pandering."

In the information it is charged that defendant by fraud and artifice procured Nellie DeRitus, a female person, to become an inmate of a house of ill fame.

Counsel argue that when the statute creating an offense uses generic terms, the pleader must set up facts so that the court can see that the defendant committed an offense, and that the statement that the defendant committed an offense by fraud and artifice is merely a legal conclusion of the pleader and charges no crime. With this we do not agree. The informant was not obliged to plead evidence. He followed the words of the statute. If, however, by virtue of their general character the defendant wished for further enlightenment as to what he was charged with, he should have asked for a bill of particulars.

The evidence is not preserved in the record, and we must presume that it was sufficient to justify the allegations.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

on January 17 a house at 111 East 2nd St. was visited by
investigator.

In the investigation it is observed that defendant
TERRY and another person were in building, a female named,
at house on January 17 at 111 East.

Defendant states that when the female speaking in 17-

house was female person, the person was not in house as
then the person was not that the defendant committed an offense,
and that the defendant that the defendant committed an offense

the female and another is female a female speaking in 17-
house and another in house, this is in the house, the
information was not given in place evidence. In the house the
house of the female. It, however, the person of which person
the female the female named for further information in
to that the person with the female have asked for a full

at defendant.
The defendant is the defendant in the house, the
with person that it was committed to the defendant.
The defendant of the defendant named for further information in

attorney.
attorney.

March Term, 1913, No

13 - 18754

(N. r.)

A. N. Lualaba and George
Remus, for plaintiff in error.

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

vs.

MICHAEL SCARLET,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

Maclay Boyne, for
defendant in error; Zach
Hoppeimer, of counsel.

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

182 I.A. 4

The plaintiff in error was prosecuted on an information charging him with an assault with a deadly weapon with intent to inflict upon Elsie Scarlet a bodily injury, without provocation and "showing an abandoned and malignant heart in the said Michael Scarlet." On a trial before the court, without a jury, he was found guilty and sentenced to thirty days in the House of Correction "at labor" and to pay a fine of one hundred dollars and the costs, etc.

The counsel for plaintiff in error contend that penal statutes being strictly construed, the sentence of the Court that the plaintiff be confined in the House of Correction "at labor" is unauthorized as inflicting a "punishment not contemplated by the criminal code, i. e. confinement 'at labor'."

The punishment provided by the statute, Section 25, Chapter 38, Wurd's Rev. Stat. 1911, for said offense is "a fine not exceeding \$1000 nor less than \$25 or imprisonment in the county jail for a period not exceeding one year, or both, in the discretion of the court." Sec. 448 is in part as follows:

"Any person convicted, in a court of this State having jurisdiction, of any crime or misdemeanor, the punishment of which is confinement in the county jail, may be sentenced by the

THE PEOPLE OF THE STATE OF
ILLINOIS,
County of Cook,
vs.
MICHAEL GONZALEZ,
Defendant.

STATE OF ILLINOIS
COUNTY OF COOK

VERDICT

The plaintiff in error was returned as an attorney
and charged him with an assault with a deadly weapon with in-
tend to injure upon Michael Gonzalez a victim injury, without
provocation and "while in the presence and company of the
said Michael Gonzalez." On a trial before the court, without a
jury, he was found guilty and sentenced to thirty days in the
house of correction "at labor" and to pay a fine of one hundred
dollars and the costs, etc.

The counsel for plaintiff in error contends that there
was error being legally construed, the sentence of the Court
that the plaintiff be confined in the house of correction "at
labor" is unauthorized as indicated in "Illinois and Centon-
dized by the criminal code, i. e. confinement at labor."

The punishment provided by the statute, Section 25,
Chapter 12, State's Rev. Stat. 1911, the said offense is "a fine
not exceeding \$1000 and less than \$500 or imprisonment in the
house of correction for a period not exceeding one year, or both, in
the discretion of the court." Sec. 125 is in part as follows:

"Any person convicted, in a court of law in these states
of any crime or misdemeanor, the punishment of
which is confinement in the county jail, may be sentenced by the

"court in which such conviction is had, to labor for the benefit of the county, during the term of such imprisonment, in the workhouse, house of correction, or other place provided for that purpose by the county or city authorities." It also appears by the said judgment that an agreement under Sections 8 and 9 of Chapter 67 of said statutes exists between the County of Cook and the City of Chicago providing for the custody of such persons as may be committed to the said house of correction.

The judgment is affirmed.

AFFIRMED.

"There is which was committed to him in 1861 by the
 City of the County, during the term of which he was
 the President, under the authority of the Board of
 the City of the County, to the extent of his
 powers as the said President, that he was not
 and is not bound by the said City of the County
 of Cook and the City of Chicago, providing for the
 payment of any debt or liability of the City of
 Chicago, as provided in the said Act of 1861.
 The judgment is affirmed.

J. W. WILSON

29 - 17532

ABE E. FRIEDMAN,
Defendant in Error,

vs.

JOSEPH SHUFLITOWSKI,
Plaintiff in Error.

Error to
Superior Court,
Cook County.

182 I.A. 5

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review a judgment for \$500 obtained by Friedman against Shuflitowski in an action for personal injuries claimed to have been sustained by Friedman by reason of an alleged assault upon him by Shuflitowski, hereinafter called defendant.

As the judgment must be reversed and the cause remanded for a new trial, it is not necessary to enter into any extended statement of the facts involved. Defendant was engaged in business on 12th street, in Chicago, and upon the day in question entered into a controversy with the plaintiff over the use of a telephone in the defendant's place of business. There was a sharp conflict in the testimony as to which of the two was the aggressor, and as to the conduct of each party. Among other things it was claimed by the plaintiff, Friedman, and his witnesses that the defendant slapped and struck the plaintiff and finally kicked him on the right side of the groin, from which a hernia developed. The chief item of injury claimed is this hernia.

Defendant denies that he did more than catch hold of the young man's hand, and particularly denies that he kicked the plaintiff.

In this condition of the testimony plaintiff asked a doctor, testifying on his behalf as an expert medical witness, a hypothetical question containing the supposition that the defendant

REPORT OF
JURY
IN CASE NO. 1724

THE PEOPLE OF THE STATE OF ILLINOIS
VS.
JOHN EDWARD BROWN
Defendant

VERDICT

MR. PRESIDING JUDGE HONORABLE
DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review a judgment for \$200
obtained by Friedman against Gmellinowski in an action for per-
sonal injuries claimed to have been sustained by Friedman by
reason of an alleged assault upon him by Gmellinowski, defendant
called defendant.

As the judgment must be reversed and the cause remanded
for a new trial, it is not necessary to enter into any extended
statement of the facts involved. Defendant was engaged in busi-
ness on 12th street, in Chicago, and upon the day in question en-
tered into a controversy with the plaintiff over the use of a tele-
phone in the defendant's place of business. There was a sharp con-
tention in the testimony as to which of the two was the aggressor,
and as to the conduct of each party. Among other things it was
claimed by the plaintiff, Friedman, and his witnesses that the de-
fendant slapped and struck the plaintiff and threw him down
on the right side of the groin, from which a painful laceration
The chief item of injury claimed is this laceration.

Defendant denies that he did more than catch hold of the
young man's hand, and particularly denies that he kicked the plaintiff.
In this condition of the testimony plaintiff called a doc-
tor testifying on his behalf as an expert medical witness, a ques-
tional question containing the suggestion that the defendant

had kicked the plaintiff in the groin, with resulting injuries as testified to by plaintiff, and concluded the question as follows: "Have you an opinion whether or not the condition you found on your examination of the plaintiff resulted from such a kick?" This question was objected to on the ground that whether or not the injury complained of was produced by a kick was for the jury to determine and not for the witness to testify to, but the objection was overruled and the witness was permitted to say "that it could have resulted from an injury such as you have described."

The overruling of an objection to such a question has been repeatedly held to be reversible error. *I. C. R. R. Co. v. Smith*, 208 Ill. 608. In *City of Chicago v. Didier*, 227 Ill. 571, the rule is stated to be: "Where there is a conflict in the evidence as to whether the plaintiff was injured in the manner claimed, it is not competent for witnesses to give their opinions on that subject."

In the case at bar the question as to whether or not defendant had kicked plaintiff was sharply disputed, and therefore the question put to the medical witness was clearly improper as invading the province of the jury.

We are also inclined to hold that the criticisms of some of the instructions given by the court are well taken. The first instruction given at the request of plaintiff, which requires that the jury "must be satisfied from all the evidence" that the assault by the defendant was done in necessary self defense, etc., is erroneous. The jury are not required in a civil case to be "satisfied" from all the evidence. *Kelley v. Malhoit*, 115 Ill. App. 23; *Graves v. Colwell*, 90 Ill. 612. The instruction was further erroneous in requiring defendant to establish that the act of self defense was necessary, instead of requiring him to show that such act reasonably appeared to be necessary. *Paxton v.*

had kicked the plaintiff in the groin, with resulting injuries as testified to by plaintiff, and surrounded the question as follows: "Have you an opinion whether or not the condition you found on your examination of the plaintiff resulted from such a kick?" This question was objected to on the ground that whether or not the injury complained of was produced by a kick was for the jury to determine and not for the witness to testify to, but the objection was overruled and the witness was permitted to say "that it could have resulted from an injury such as you have described."

The overruling of an objection to such a question has been repeatedly held to be reversible error. *1. G. R. Co. v. Smith*, 308 Ill. 608. In *City of Chicago v. Smith*, 308 Ill. 611, the rule is stated to be: "Where there is a conflict in the evidence as to whether the plaintiff was injured in the manner claimed, it is not competent for witnesses to give their opinion on that subject."

In the case at bar the question as to whether or not defendant had kicked plaintiff was sharply disputed, and therefore the question put to the medical witness was sharply improper as involving the province of the jury.

We are also inclined to hold that the criticisms of some of the instructions given by the court are well taken. The instruction given at the request of plaintiff, which requires that the jury "must be satisfied from all the evidence" that the defendant is liable, is erroneous. The jury are not required in a civil case to be "satisfied" from all the evidence. *Kelly v. Kelly*, 115 Ill. App. 33; *Graves v. Delwell*, 90 Ill. 612. The instruction was further erroneous in requiring defendant to establish his act of self defense was necessary, instead of requiring him to show that such act reasonably appeared to be necessary. *Palmer v.*

Boyer, 67 Ill. 132.

The second instruction is open to the criticism that it instructed the jury to award exemplary damages if malice had been shown, without conditioning this upon defendant's being found guilty. Anderson v. Moore, 108 Ill. App. 106.

For the reasons above indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Page 37 of 111. 188.

The second instruction is given to the jury in the following language: "The jury is instructed that it is their duty to return a verdict of guilty or not guilty, without consideration of the defendant's guilt or innocence, and without consideration of the defendant's character or conduct."

Given orally by the court, the jury, the 11th day of May, 1908.

For the reasons above indicated the judgment will be

reversed and the cause remanded.

REVEREND AND HONORABLE.

October Term, 1911. No.

157 - 17686.

LEOPOLD BRODOWICZ,
Appellee,
vs.
DOMINIK GIACZAS,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

182 I.A. 10

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the trial court denying a motion to vacate a judgment. In October, Leopold Brodowicz, hereinafter called plaintiff, filed a praecipe in the Circuit Court of Cook County, returnable to the December term, 1910, and the defendant was served with summons November 1, 1910. In December the plaintiff filed his declaration, with an affidavit showing the nature of his demand and the amount due. On January 11, 1911, the defendant filed his general appearance, and with it a document which in the abstract before us is described as an affidavit of merits, without giving us any information as to its contents.

On February 11th, which would be within the January term of the Circuit Court, without notice to the defendant, the plaintiff, by his attorneys, came into court and asked for a judgment on the ground that the affidavit of merits filed by the defendant was insufficient under the statute. The court so held and entered judgment against the defendant. On March 21, 1911, which was during a term of court following the term at which the judgment was entered, the defendant's attorney filed an affidavit stating that he had received no notice of the motion of February 11th, and filed a motion to set aside and vacate the judgment heretofore entered, on the ground that under the rules of the Circuit Court the court had no power to strike said affidavit of merits from the files and to enter judgment by default against the defendant. After

There is no appeal from an order of the police court imposing a fine or a sentence of imprisonment, or both, in a criminal case. The defendant, who was charged with the crime of larceny, was arrested on November 1, 1911, and was held in the police court until November 1, 1911. On November 1, 1911, the defendant was arraigned and pleaded guilty to the crime of larceny. The police court sentenced the defendant to a term of imprisonment of six months, and to a fine of \$100.00. The defendant appealed from the sentence of the police court to the Circuit Court of the City of New York. The Circuit Court affirmed the sentence of the police court. The defendant then appealed from the judgment of the Circuit Court to the Appellate Division of the Supreme Court of the State of New York. The Appellate Division affirmed the judgment of the Circuit Court. The defendant then appealed from the judgment of the Appellate Division to the Court of Appeals of the State of New York. The Court of Appeals affirmed the judgment of the Appellate Division. The defendant then appealed from the judgment of the Court of Appeals to the United States Supreme Court. The United States Supreme Court affirmed the judgment of the Court of Appeals. The defendant then appealed from the judgment of the United States Supreme Court to the United States Supreme Court. The United States Supreme Court affirmed the judgment of the United States Supreme Court.

hearing, the court denied the defendant's said motion to set aside and vacate the judgment, from which ruling by the court the defendant, by his counsel, prayed an appeal, which is now before us.

Counsel for appellant have argued as if this were a writ of error to review the entire record, including the propriety of the judgment; but this arises from a misapprehension of the situation. The only matter for our consideration at present is the ruling of the trial court denying the motion to vacate.

The grounds for said motion were, in substance, that the court was not informed as to Rule 15 of the Circuit Court, which provides that no motion will be heard or order made without notice to the opposite party, when the appearance of such party has been entered, and that no such notice having been served on the defendant, although his appearance was on file, the court wrongfully and in violation of such rule entered a judgment.

The question before us, therefore, is, had the trial court the right to vacate a judgment after the term at which it had been entered had passed, because the court had entered the judgment in ignorance of said Rule 15 of the Circuit Court of Cook County?

This court had occasion recently to consider this identical question in *Cramer v. Illinois Commercial Men's Association*, No. 17499. We there held that an error of this kind is an error of law and not an error of fact, and that therefore the court had no power to set aside a judgment after term. The reasoning and cases supporting this conclusion may be found in the opinion filed in that case.

From this it follows that if the court had no power to correct an error of law after the term had expired in which the error was committed, and the error in this case being an error of law, the ruling of the trial court denying the motion to vacate the judgment was correct, and it will be affirmed.

AFFIRMED.

...the court denied the defendant's claim that he was not
...and vacate the judgment, from which ruling by the court the defendant
...by his counsel, passed an appeal, which is now before us.
...Counsel for appellant have argued as to this that a writ
...to stay to review the entire record, including the propriety of
...the judgment; but this arises from a misunderstanding of the nature
...of the writ. The only writ for the consideration of the entire
...record of the trial court denying the motion is a writ of
...The grounds for said motion were, in substance, that the
...court was not informed as to Rule 13 of the Circuit Court, which
...provides that no motion will be heard or order made without notice
...to the opposite party, when the appearance of such party has been
...waived, and that no such notice having been served on the defend-
...ant, although his appearance was on this, the court erroneously and
...in violation of such rule entered a judgment.

The question before us, therefore, is, had the trial
...court the right to vacate a judgment after the term at which it
...had been entered had passed, because the court had entered the
...judgment in ignorance of said Rule 13 of the Circuit Court of

that County?
...This court had occasion recently to consider this identical
...question in *Wagner v. Illinois Commercial Bank's Association*, 111
...Ill. 17802. We there held that an error of this kind is an error
...of law and not an error of fact, and that therefore the court had
...no power to set aside a judgment after term. The reasoning and
...cases supporting this conclusion may be found in the opinion filed
...in that case.

From this it follows that if the court had no power to
...correct an error of law after the term had expired at which the
...error was committed, and the error in this case being an error of
...law, the ruling of the trial court denying the motion to vacate
...the judgment was correct, and it will be affirmed.

813 - 17744.

CORNELIUS WIERSEMA,
Defendant in Error,

vs.

LOCKWOOD & STRICKLAND CO.,
a corporation,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

182 I.A. 11

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Cornelius Wiersema, hereinafter called plaintiff, recovered a judgment for \$500 as damages for personal injuries received by him while in the employ of the Lockwood & Strickland Co., a corporation, the defendant, and we are asked to reverse this judgment.

The defendant owns and operates a factory in which are many wood-working machines. At the time of the accident the plaintiff was engaged in carrying boards to a man operating a planer. In front of the planer are two revolving shafts, each about four or five feet long, about 18 inches above the floor, and also about 18 inches apart. On the ends of the shafts are pulleys from which belts run to the planer. Between these shafts was a wooden horse about three feet long and 3 1/2 feet high. On top of this horse was a wooden roller, across which long boards were pushed into the planer. However, when short boards were being planed, as they would not reach from the planer to this roller, the operator would stand between it and the planer and would receive the short boards from the helper, who would hand them to him across the roller. At the time of the accident the plaintiff was one of these helpers and was engaged in carrying short boards to the operator. On one of these trips he carried his bundle of boards up to the roller, and testifies that there-

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... ..

very much-needed material. It was him at the beginning of
his life who was engaged in creating bonds to a new generation of
people. In terms of the human we can recognize another, and
show him of his own kind, when he looks across the line,
and also about in human space. In the end of the world we
find him who calls him in the future. Between these things

One of the horses was a wooden roller, which was used to roll the material into the rollers. The rollers were made of wood and were mounted on a frame. The material was fed into the rollers and was then rolled into a sheet. The sheet was then cut into strips and was then used for various purposes. The rollers were used for many years and were very effective in rolling the material.

[illegible]

upon he handed it over the roller and shafting to the operator, and that to do this he had to bend over the shafting and roller. Apparently after the operator had received the bundle of boards, and as the plaintiff was turning to leave, his right trouser leg was caught by something connected with the shaft or pulley, and he was thrown down. His statement of the accident is that "there was something that caught me like one of them shafts and it was a screw or something like that that caught me behind and throwed me down on the second shaft." He also says that the right legs of his trousers and overalls were torn. There was testimony on behalf of the defendant that plaintiff had stepped upon one of the hangers which supported the shafts from the floor, and then fell over.

The jury returned special findings to the effect that the plaintiff did not know at and before the time of the accident that the pulleys or shafts of the machine in question were not guarded; also that he was in the exercise of ordinary care for his own safety at and immediately before the time of the accident, and also that the risk of being injured while doing the work which he was doing at the time of the accident was not so imminent that a man of ordinary prudence would not have incurred the risk or hazard of doing such work.

The defendant did not in its motion for a new trial, or otherwise, move that these special findings be set aside, and there is no assignment of error in that regard. Therefore the defendant is bound by the same. *City of Aurora v. Rockabrand*, 146 Ill. 399; *Penn. Coal Co. v. Kelly*, 156 Ill. 9; *Empire Machinery Co. v. Brady*, 164 Ill. 86; *Voigt v. Anglo-American Prov. Co.*, 104 Ill. App. 423; *P. C. C. & St. L. Ry. Co. v. Bevard*, 121 Ill. App. 49; *Tate v. Mo. Pac. Ry. Co.*, 127 Ill. App. 105. These special findings of the jury settled the questions touching the conduct of the plaintiff.

There is a sharp controversy as to the negligence of the defendant, and we are free to confess that whether or not plaintiff's trousers were caught by a set screw or other projection from the shaft or pulley is not entirely clear.

In addition to the allegation that said pulleys and shafts had bolts projecting therefrom, plaintiff also alleged that these shafts, belts and pulleys were unprotected, in violation of the city ordinance. In support of this allegation the city ordinance was introduced in evidence, and is as follows:

"874. Safety of Employees, Provision for:

In every factory, workshop or other place or structure, where machinery is employed, the belting, shafting, gearing, elevators and every other portion of machinery when so located as to endanger the lives and limbs of those employed therein, while in the discharge of their duties, shall be as far as possible so covered or guarded as to make them reasonably safe and to prevent injury to such employees."

Defendant's counsel asserts that this ordinance is invalid for the reason, as claimed, that the City of Chicago had no power to pass it. We are referred to no decisions on this point. We are of the opinion, however, that the power to pass such an ordinance is within the inherent police powers delegated to a municipality. "The safety of life, limb, and property being one of the prime objects of municipal incorporation, all appropriate regulations tending to promote this object are within the police power delegated to a municipality." 33 Cyc. 705. No question is raised as to the reasonableness of the ordinance, and we must hold it to be a valid exercise of the police power of the municipality.

We have some doubt as to whether or not the question of the validity of this ordinance is properly before us. "If appellant desired to raise the question of the validity of the ordinance on the ground that it was in violation either of

There is a strong impression as to the character of the individual, and as the fact is known that certain of the individuals, a statement was made in a way which is not... leading from the fact to which is not entirely clear... it is similar to the situation that said policy and... matter has been previously mentioned, possibly also... that these things, both and policy were supported, in the... failure to the city authorities. In answer to this question... the city authorities are interested in evidence, and in the...

Next

"The report of evidence, however, was... in every instance, resulting in some degree of... that, many witnesses in evidence, the policy, however... handling, evidence and some other evidence of... that as limited as it was, the fact and... those who were involved, while in the absence of... evidence, shall be as far as possible to prevent the... as to the fact of evidence, and as to the... in the evidence."

Continued's evidence, however, that this evidence is... leading to the evidence, as to which, that the fact of... was as good as gone in. We are not sure in the evidence as... this point, we say at the point, however, that the point is... fact, that in evidence, in which the fact of... evidence is a possibility. The fact of this, that, and... evidence, that of the fact of evidence, however... rather, all evidence, however, leading to evidence, that... object are within the fact of evidence, as a possibility... at that time. The question is, whether as to the... of the evidence, and we want to be as to the... the fact of the evidence.

We have now about as to the fact of the... of the fact of the evidence, as to the fact of... "The evidence, however, is within the fact of the... the evidence, as to the fact of the evidence, as to the...

a statute or the constitution, he should have embodied that question in a written proposition to be held as the law and preserved an exception to the ruling." The People v. Harrison 223 Ill. 540 (545).

The contention that even if the ordinance was valid, the plaintiff, knowing of the conditions surrounding the place, therefore assumed the risk, is answered completely by the case of Streeter v. Western Wheeled Scraper Co., 254 Ill. 244, which was followed in O'Donnell v. Riter-Conley Mfg. Co., 172 Ill. App. 301. In these cases it is held that an employe does not by working on an unguarded machine, with knowledge that it is unguarded, assume the risk of injury from the master's failure to comply with an ordinance or statute requiring such machine to be suitably guarded.

It is argued that the plaintiff tried the case on the theory of a specific negligent order, and that the court instructed the jury on this theory. We do not so understand it. The plaintiff's statement of claim is not based on any such theory, and the jury was instructed that the plaintiff could not recover unless the negligence charged therein was proved.

The instructions complained of undertook to instruct as to the duty of the master to furnish a reasonably safe place to work, and as to the assumption of risk the references to the orders of the foreman are merely incidental. Taken as a whole, we do not find reversible error in the instructions.

For the reasons above indicated the judgment will be affirmed.

AFFIRMED.

a statute of the jurisdiction, he should have pleaded that
question in a timely manner as he did not do so and
presented no evidence in the trial. The People's Attorney
has the right to do so.

The contention that even in the absence of such
evidence, the finding of the jury regarding the issue
of negligence is not binding on the court is not
correct. It is well settled that the jury's verdict is
binding on the court in the absence of such evidence.
The People's Attorney has the right to present such
evidence as he sees fit. The court is not bound by
the jury's verdict in the absence of such evidence.
The People's Attorney has the right to present such
evidence as he sees fit. The court is not bound by
the jury's verdict in the absence of such evidence.

It is argued that the plaintiff failed to show on the
basis of a specific negligent act, and that the same
act was not the cause of the injury. The court is not
bound by the jury's verdict in the absence of such
evidence. The People's Attorney has the right to present
such evidence as he sees fit. The court is not bound
by the jury's verdict in the absence of such evidence.

The defendant's contention that the plaintiff failed to
show on the basis of a specific negligent act, and that
the same act was not the cause of the injury, is not
binding on the court. The People's Attorney has the
right to present such evidence as he sees fit. The
court is not bound by the jury's verdict in the
absence of such evidence.

October Term, 1911. No.

245 - 17779.

JOSEPH PECCHIA,
Appellee,

vs.

INTERNATIONAL HARVESTER COM-
PANY, a corporation,
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

C. H. Sippel and Son
Attorneys for appellee.

MR. PRESIDING JUSTICE MCGURNEY

DELIVERED THE OPINION OF THE COURT.

182 I.A. 19

This is an appeal from a judgment against the International Harvester Company, hereinafter called defendant, in a suit brought by Joseph Pecchia, hereinafter called plaintiff, to recover damages for personal injuries received by him while in the employ of the defendant. He was injured by having his left hand and arm caught between a belt and a revolving shaft or pulley.

The regular employment of the plaintiff was as an operator on a grinding machine in a large room filled with machinery. These machines were run by power transmitted from a large main shaft. These moving machines, shafts, pulleys and belts were in plain sight. Plaintiff had worked for five years in this room and at the same machine. Upon the morning of the accident in question, when the machine was first started, the belt from the main shaft and pulley running to the machine broke. This belt ran from a pulley on the main shaft opposite the machine, and was about twenty feet long "doubled up", six inches wide, and a quarter of an inch thick.

Plaintiff says he informed the foreman that the belt was broken and asked that a man be sent to fix it, but was ordered to go back and fix the belt himself; that he told the foreman he did not know how to fix it, and the foreman then said, "if you don't know how to fix it go home"; that the foreman then handed the plaintiff a rope and said "here, fix that belt", at the same time showing

$\text{CH}_3\text{COOH} = \text{Acid}$

REF ID: A1285

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REMARKS: [REDACTED]

the weight of the document. The two papers are all considered and the

...and the fact that the ...

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... ..

phases. These authors found a positive correlation between the amount of time spent in the different phases and the level of self-esteem.

... will do your utmost ability and energy until you have reached the goal.

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...the

1. The following is a list of the names of the persons who have been appointed to the various positions in the various departments of the Government of the State of New York, for the year 1900.

1914

1. In the first case the quantity, α is small, while in the second case, α is large.

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04 Introduction: how this 2014-2015 season of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th, 101st, 102nd, 103rd, 104th, 105th, 106th, 107th, 108th, 109th, 110th, 111th, 112th, 113th, 114th, 115th, 116th, 117th, 118th, 119th, 120th, 121st, 122nd, 123rd, 124th, 125th, 126th, 127th, 128th, 129th, 130th, 131st, 132nd, 133rd, 134th, 135th, 136th, 137th, 138th, 139th, 140th, 141st, 142nd, 143rd, 144th, 145th, 146th, 147th, 148th, 149th, 150th, 151st, 152nd, 153rd, 154th, 155th, 156th, 157th, 158th, 159th, 160th, 161st, 162nd, 163rd, 164th, 165th, 166th, 167th, 168th, 169th, 170th, 171st, 172nd, 173rd, 174th, 175th, 176th, 177th, 178th, 179th, 180th, 181st, 182nd, 183rd, 184th, 185th, 186th, 187th, 188th, 189th, 190th, 191st, 192nd, 193rd, 194th, 195th, 196th, 197th, 198th, 199th, 200th, 201st, 202nd, 203rd, 204th, 205th, 206th, 207th, 208th, 209th, 210th, 211th, 212th, 213th, 214th, 215th, 216th, 217th, 218th, 219th, 220th, 221st, 222nd, 223rd, 224th, 225th, 226th, 227th, 228th, 229th, 230th, 231st, 232nd, 233rd, 234th, 235th, 236th, 237th, 238th, 239th, 240th, 241st, 242nd, 243rd, 244th, 245th, 246th, 247th, 248th, 249th, 250th, 251st, 252nd, 253rd, 254th, 255th, 256th, 257th, 258th, 259th, 260th, 261st, 262nd, 263rd, 264th, 265th, 266th, 267th, 268th, 269th, 270th, 271st, 272nd, 273rd, 274th, 275th, 276th, 277th, 278th, 279th, 280th, 281st, 282nd, 283rd, 284th, 285th, 286th, 287th, 288th, 289th, 290th, 291st, 292nd, 293rd, 294th, 295th, 296th, 297th, 298th, 299th, 300th, 301st, 302nd, 303rd, 304th, 305th, 306th, 307th, 308th, 309th, 310th, 311th, 312th, 313th, 314th, 315th, 316th, 317th, 318th, 319th, 320th, 321st, 322nd, 323rd, 324th, 325th, 326th, 327th, 328th, 329th, 330th, 331st, 332nd, 333rd, 334th, 335th, 336th, 337th, 338th, 339th, 340th, 341st, 342nd, 343rd, 344th, 345th, 346th, 347th, 348th, 349th, 350th, 351st, 352nd, 353rd, 354th, 355th, 356th, 357th, 358th, 359th, 360th, 361st, 362nd, 363rd, 364th, 365th, 366th, 367th, 368th, 369th, 370th, 371st, 372nd, 373rd, 374th, 375th, 376th, 377th, 378th, 379th, 380th, 381st, 382nd, 383rd, 384th, 385th, 386th, 387th, 388th, 389th, 390th, 391st, 392nd, 393rd, 394th, 395th, 396th, 397th, 398th, 399th, 400th, 401st, 402nd, 403rd, 404th, 405th, 406th, 407th, 408th, 409th, 410th, 411th, 412th, 413th, 414th, 415th, 416th, 417th, 418th, 419th, 420th, 421st, 422nd, 423rd, 424th, 425th, 426th, 427th, 428th, 429th, 430th, 431st, 432nd, 433rd, 434th, 435th, 436th, 437th, 438th, 439th, 440th, 441st, 442nd, 443rd, 444th, 445th, 446th, 447th, 448th, 449th, 450th, 451st, 452nd, 453rd, 454th, 455th, 456th, 457th, 458th, 459th, 460th, 461st, 462nd, 463rd, 464th, 465th, 466th, 467th, 468th, 469th, 470th, 471st, 472nd, 473rd, 474th, 475th, 476th, 477th, 478th, 479th, 480th, 481st, 482nd, 483rd, 484th, 485th, 486th, 487th, 488th, 489th, 490th, 491st, 492nd, 493rd, 494th, 495th, 496th, 497th, 498th, 499th, 500th, 501st, 502nd, 503rd, 504th, 505th, 506th, 507th, 508th, 509th, 510th, 511th, 512th, 513th, 514th, 515th, 516th, 517th, 518th, 519th, 520th, 521st, 522nd, 523rd, 524th, 525th, 526th, 527th, 528th, 529th, 530th, 531st, 532nd, 533rd, 534th, 535th, 536th, 537th, 538th, 539th, 540th, 541st, 542nd, 543rd, 544th, 545th, 546th, 547th, 548th, 549th, 550th, 551st, 552nd, 553rd, 554th, 555th, 556th, 557th, 558th, 559th, 560th, 561st, 562nd, 563rd, 564th, 565th, 566th, 567th, 568th, 569th, 570th, 571st, 572nd, 573rd, 574th, 575th, 576th, 577th, 578th, 579th, 580th, 581st, 582nd, 583rd, 584th, 585th, 586th, 587th, 588th, 589th, 590th, 591st, 592nd, 593rd, 594th, 595th, 596th, 597th, 598th, 599th, 600th, 601st, 602nd, 603rd, 604th, 605th, 606th, 607th, 608th, 609th, 610th, 611th, 612th, 613th, 614th, 615th, 616th, 617th, 618th, 619th, 620th, 621st, 622nd, 623rd, 624th, 625th, 626th, 627th, 628th, 629th, 630th, 631st, 632nd, 633rd, 634th, 635th, 636th, 637th, 638th, 639th, 640th, 641st, 642nd, 643rd, 644th, 645th, 646th, 647th, 648th, 649th, 650th, 651st, 652nd, 653rd, 654th, 655th, 656th, 657th, 658th, 659th, 660th, 661st, 662nd, 663rd, 664th, 665th, 666th, 667th, 668th, 669th, 670th, 671st, 672nd, 673rd, 674th, 675th, 676th, 677th, 678th, 679th, 680th, 681st, 682nd, 683rd, 684th, 685th, 686th, 687th, 688th, 689th, 690th, 691st, 692nd, 693rd, 694th, 695th, 696th, 697th,

100-443887-1000

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How long is the life of a man? The answer is: it is not known.

Journal of Management Education 30(6) 789-804

the plaintiff how to tie the rope around the broken ends of the belt. The plaintiff raised a ladder and leaned it against the running shaft, tied the rope around the belt while standing on the floor, and then climbed the ladder, taking the rope and belt with him. Arriving at the top of the ladder and standing some sixteen feet from the floor, he tied the free end of the rope to the top of the ladder to support the weight of the belt as it was suspended across the space between the main shaft and the counter-shaft at the machine. He placed one end over the main shaft and the other end under the shaft, bringing the two ends together between his body and the shaft. He then proceeded to fasten the two ends together by inserting the hooks used for that purpose, and when he had gotten four of the hooks in, the rope suddenly broke at a point midway between where it was tied to the ladder and where it was tied around the belt; that this allowed the belt to fall down against the shaft, dragging his hand, which was inside the belt, with it; that the belt then wrapped and twisted around the shaft, taking his arm with it.

We have reached the conclusion that the plaintiff, in undertaking to repair and replace the broken belt, assumed the risk of the injury from such work. It makes no difference that he was ordered from his regular employment into the more dangerous work. *C. R. I. & P. Ry. Co. v. Rinnars*, 190 Ill. 9; *Consolidated Coal Co. of St. Louis v. Maenni*, 146 Ill. 314; *Republic Iron & Steel Co. v. Lee*, 227 Ill. 246. If plaintiff knew the danger of placing belts on revolving shafts or pulleys, or from his experience or by the exercise of his senses should have known, he will be held to have assumed the risk. He had worked at this machine for five years. The rapidly turning shafts, pulleys and belts were all around him, and he had repeatedly repaired and replaced broken belts and pulleys. The dangers were apparent and under-

stood by him. Neither did the foreman's statement that the plaintiff should "fix the belt or go home" relieve him of the assumption of the risk of such dangers. *Pressed Steel Car Co. v. Herath*, 207 Ill. 576.

"The true rule in this regard is, that the servant assumes not only the ordinary risks incident to his employment, but also all dangers which are obvious and apparent, and if he voluntarily enters into or continues in the service, knowing, or having the means of knowing, its dangers, he is deemed to have assumed the risks and to have waived all claims against the master for damages in case of personal injury resulting from such dangers." *McCormick Harvesting Machine Co. v. Zakzewski*, 220 Ill. 522.

In this view of the case, it was error for the court to give the third instruction at the request of the plaintiff, to the effect that it was a question of fact to be determined by the jury "whether or not the plaintiff assumed the risk." Even as an instruction upon the assumption of risk it is misleading, as not touching upon the plaintiff's knowledge of the dangers, and it does not convey any idea to the jury as to what is meant by the assumption of risk. The jury could well have concluded that it was immaterial whether or not the plaintiff was familiar with the dangers and risks.

We also think that the defendant was entitled to have the jury instructed as it requested, to the effect that where a servant is ordered by his master to engage temporarily in some other work more hazardous than his regular work, the servant assumes the risk of injury from the more hazardous employment if the extra hazard and danger are open and obvious and may be observed and known by him in the exercise of ordinary care and prudence.

The only negligence of the defendant, if there was any, was in furnishing the plaintiff with a rope of insufficient strength for the purpose of repairing the belt. Upon this point there was a sharp conflict in the evidence. The foreman denies that he gave plaintiff any rope. There is also the evidence of witnesses that the accident occurred after the belt had been repaired, and that

[illegible]

"The Commission is not in a position to make any statement at this time regarding the results of the investigation. The Commission is continuing its investigation and will make a statement when it is in a position to do so."

1. The first thing I noticed when I stepped out of the plane was the cold. It was a sharp contrast to the warm, humid air of the tropics. I had heard that the weather in the north was harsh, but I didn't realize just how cold it would be. The wind was biting, and the sun felt like a distant star. I wrapped my coat around myself and shivered. I had never experienced this before. It was a new sensation, a new challenge. I had to adapt. I had to survive. I had to find my way in a world that was so different from the one I had left behind. I took a deep breath and stepped forward. I was ready. I was determined. I was going to make it. I was going to prove to myself that I was capable of anything. I was going to show the world that I was not just a girl from a small town. I was a woman. I was a warrior. I was a survivor. I was a champion. I was a queen. I was a goddess. I was a legend. I was a hero. I was a hero.

...the ...

The committee of relations with the Indians, the Secretary of War and the President have been authorized to take such action as may be necessary to protect the Indians from the effects of the influenza epidemic.

the incident occurred at the time of the ...

the occasion of the mishap was the slipping of plaintiff's hand between the belt and the pulley while he was in the act of putting the belt on the pulley. Plaintiff's original declaration alleged that his hand was caught between the pulley and the belt.

It would serve no useful purpose to analyze in detail the circumstances of the accident in the attempt to arrive at a conclusion as to whether the plaintiff's version of it is correct, or the statements made by other eye-witnesses. As there must be another trial we refrain from any comment upon this branch of the case. The jury might have arrived at a conclusion adverse to the claim of the plaintiff on this point, and yet, in view of the failure of the court properly to instruct the jury upon the assumption of risk, be misled into returning the verdict it did, on the ground that there was no assumption of risk by the plaintiff. In this condition of the record we cannot permit such a verdict to stand.

The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

THE ABOVE INFORMATION IS FOR THE USE OF THE OFFICE OF THE ATTORNEY GENERAL AND IS NOT TO BE DISCLOSED TO THE PUBLIC.

It will appear in the course of the investigation that the statements of the witnesses in the trial of the case of the "Herald" are in many respects contradictory. It is not necessary to discuss the statements of the witnesses in the trial of the case of the "Herald" in detail. It is sufficient to say that the statements of the witnesses in the trial of the case of the "Herald" are in many respects contradictory.

Source: U.S. Department of Commerce, Bureau of Economic Analysis, *Survey of Current Business*, 1997, 76, 10, 11.

October term, 1911. No.

329 - 17,865.

October term, 1911.

JOHN CARLSON,
Appellant,

vs.

PATRICK E. HOGAN,
Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

No appearance for appellee.

132 I.A. 21

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit for the breach of a contract of agistment of a horse, originally begun before a justice of the peace at Lyons, in Cook county, Illinois, where there was a trial and a judgment for \$200 for Patrick E. Hogan, hereinafter called plaintiff. Upon appeal to the Circuit court of Cook county, there was a trial by jury, resulting in a verdict and judgment for the plaintiff for \$125, from which judgment John Carlson, hereinafter called defendant, appeals to this court.

The plaintiff pastured his horse in the defendant's pasture field, for which plaintiff was to pay \$2 per month. After some days, the horse disappeared and was never found, and this suit is brought to recover the value of the horse.

Defendant's counsel concedes that the court correctly instructed the jury as to the law, that is, that the defendant was bound to use only ordinary care. Whether he did so depended upon the condition of the fence surrounding the pasture, and this question of fact was decided by the jury against the defendant. The verdict is claimed to be contrary to the preponderance of the evidence. The plaintiff testified to the effect that there was practically no fence around that pasture. The defendant and two other witnesses testified to the contrary. This court should, without hesitation, set aside a verdict manifestly against

THE COURT
JAMES L. HARRIS
JAMES L. HARRIS
JAMES L. HARRIS

THE COURT

THE COURT

1911

THE COURT

THE COURT

This is an action in rem for the recovery of a
sum of money of a horse, originally owned by a
person of the name of Jones, in Cook County, Illinois, there
being a writ and a judgment for the same for Patrick H. Jones,
hereinafter called plaintiff. Upon appeal to the Circuit Court
of Cook County, there was a trial by jury, resulting in a ver-
dict and judgment for the plaintiff for \$100, from which judg-
ment the defendant, hereinafter called defendant, appeals to this
court.

The plaintiff purchased his horse in the defendant's
pasture field, for which plaintiff was to pay \$5 per month. At
five days, the horse disappeared and was never found, and
this suit is brought to recover the value of the horse.
Defendant's counsel conceded that the court correctly
instructed the jury as to the law, that is, that the defendant
was bound to use only ordinary care. Further he did so regard-
less the condition of the horse surrounding the pasture, and
this question of fact was decided by the jury against the defendant.
The verdict is claimed to be contrary to the preponderance
of the evidence. The plaintiff testified to the effect that
there was practically no fence around his pasture. The defend-
ant and two other witnesses testified to the contrary. This court
should, without hesitation, set aside a verdict manifestly against

the weight of the evidence, but the preponderance is not necessarily on the side of the greater number of witnesses. Other proper elements which the jury had the opportunity to observe and consider and which we have not, probably inclined the jury towards the plaintiff's side of the case. In two trials the finding has been for the plaintiff, and we are not inclined to disturb this conclusion.

It is argued that the verdict for \$125 is excessive. In the first trial plaintiff recovered \$200. We cannot say that our judgment as to the value of the horse is better than that of the jurors who heard and saw the witnesses in the case.

The judgment will therefore be affirmed.

AFFIRMED.

THE AMERICAN TRUST & SAVINGS BANK,
now known as CONTINENTAL AND COM-
MERCIAL TRUST AND SAVINGS BANK,
Trustee in Bankruptcy of the es-
tate of CHARLES J. FELT, Bankrupt,

Appellee,

vs.

WILLIAM J. ELLIS and ALBERT ELLIS,
co-partners trading as WILLIAM
J. ELLIS & COMPANY,

Appellants.

1821.A. 22

Appeal from
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$800 entered upon the verdict of a jury in a suit brought by the trustee of the estate of Charles J. Felt, bankrupt, hereinafter called plaintiff, against William J. and Albert Ellis, co-partners, hereinafter called defendants, to recover the value of property claimed to have been transferred unlawfully by Felt to the defendants immediately prior to his bankruptcy, intending thereby to prefer the defendants to other creditors.

The suit was commenced under section 60-b of the Bankruptcy Act of 1898, which is as follows:

"If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer, or of the recording or registering of the transfer, if by law recording or registering thereof is required, and being within four months before the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the transfer then operate as a preference and the person receiving it or to be benefited thereby or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

It is stipulated that the transfer of Felt's property to the defendants was within four months prior to the bankruptcy proceeding, and that the defendants sold it for \$1,200 cash.

THE BANKRUPTCY COURT & DISTRICT COURT
OF THE DISTRICT OF COLUMBIA
IN RE THE ESTATE OF
WILLIAM A. WELLS, DECEASED
ADMINISTRATOR

WILLIAM A. WELLS and ALBERT WELLS,
DECEASED, by WILLIAM
A. WELLS & COMPANY,
ADMINISTRATORS

IN RE THE ESTATE OF
WILLIAM A. WELLS, DECEASED
ADMINISTRATOR

This is an appeal from a judgment for \$200 entered upon
the verdict of a jury in a suit brought by the trustee of the es-
tate of William A. Wells, deceased, administrator, against
against William A. and Albert Wells, co-defendants, defendants
to recover the value of property claimed to
have been transferred unlawfully by Wells to the defendants inas-
much as prior to his bankruptcy, intending thereby to prefer the
defendants to other creditors.

The suit was commenced under section 303 of the Bank-
ruptcy Act of 1937, which is as follows:

"If a bankrupt shall have * * * made a transfer of any
of his property, and if, at the time of the transfer, or of the
recording or registering of the transfer, it be law according
or registering thereof is required, and being within four months
before the petition in bankruptcy is filed, the trustee of the
and before the appointment of the trustee, the trustee of the
transfer then operates as a preference and the person receiving
thereof shall be deemed to have received the same as a preference,
if it can be proved that the transfer was made with intent to
shall then have reasonable cause to believe that the transfer
of such transfer would effect a preference, it shall be deemed
by the trustee and he may recover the property or the value there-
of from such person."

It is stipulated that the transfer of Wells' property to
the defendants was within four months prior to the bankruptcy pro-
ceeding, and that the defendants sold it for \$1,200 cash.

It is claimed by the defendants that the fixtures in Felt's store belonged to them or to one of the partners, and that Felt was allowed the use of the same. On the other hand it was claimed that the defendants were creditors of Felt to the amount of \$600, the purchase price of the fixtures. The jury found with the latter claim.

There was also submitted to the jury the question whether the defendants had reasonable cause to believe a preference was intended by the transfer of the store property from Felt to them, and the jury concluded there was such reasonable cause.

To discuss in detail the evidence submitted touching these questions of fact would unduly extend this opinion. We are content to say that from a consideration of the evidence we see no reason to hold that the conclusion of the jury was not justified. All the other elements essential to the recovery of an unlawful preference are admitted by the stipulation.

The ruling of the court touching the check for \$95 payable to the Moneyweight Scale Co. was not reversible error. The testimony that this check was paid was not disputed, and the evidence of the check itself would be merely cumulative.

There was no substantial error in the instructions of the court to the jury, although they were unconscionably long.

The verdict of the jury not being against the weight of the evidence and there being no reversible error upon the trial, the judgment will be affirmed.

AFFIRMED.

October Term, 1911. No.

420 - 17959

*H James Hubbert, Jr
Appellant.*

THE TITLE GUARANTY & SURETY CO.,
a corporation,

Appellee,

vs.

W. J. TURNES,

Appellant.

182 I.A. 23

Appeal from
Municipal Court
of Chicago.

*H Sheriff, Dent, Dobyne
& Freeman, for appellee.*

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment obtained by The Title Guaranty & Surety Co., hereinafter called plaintiff, against W. J. Turnes, hereinafter called defendant, in a suit claiming liability of the defendant under section 18, chapter 32, Illinois Statutes, for debts and liabilities made by him while doing business as "W. J. Turnes Co.," a pretended corporation. This section 18 is as follows:

"If any person or persons being, or pretending to be, an officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, or pretended corporation, without complying with the provisions of this act, before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation, or pretended corporation."

The facts giving rise to the suit are as follows: On June 26, 1905, the United States Government entered into a contract with the so-called "W. J. Turnes Co." for the construction of a guard house at Indianapolis, Indiana, the Turnes Co. giving a bond, with the plaintiff as surety, for the faithful performance of the work. To obtain this bond, application was made to plaintiff on the same date. In this application it is stated that W. J. Turnes Co., the applicant, is an Illinois corporation, organized in March, 1898; that Wm. J. Turnes is its president, and one Frank Paschen its secretary, and the application is signed

1851 A. 23

Appeal from
Municipal Court
of Chicago.

THE TITLE GUARANTY & SURETY CO.,
a corporation,

vs.
W. J. TURNER,
Appellant.

THE TITLE GUARANTY & SURETY CO.,
Plaintiff in Error, vs. W. J. TURNER,
Defendant in Error.

This is an appeal from a judgment obtained by the Title
Guaranty & Surety Co., hereinafter called plaintiff, against W. J.
Turner, hereinafter called defendant, for a debt arising from
of the defendant under section 12, chapter 12, Illinois Statutes,
for debts and liabilities incurred by him while doing business as
"W. J. Turner Co.," a pretended corporation. This section is as
follows:

"If any person or persons being, or pretending to be,
an officer or agent, or board of directors, of any stock cor-
poration, or pretended stock corporation, shall assume to ex-
ercise corporate powers, or use the name of any such corpo-
ration, or pretended corporation, without authority with the
provisions of this act... Every person who shall be guilty of
violation shall be jointly and severally liable for all debts and li-
abilities made by them, and contracted in the name of such cor-
poration, or pretended corporation."

The facts giving rise to the case are as follows: On
the 21st day of May, 1908, the United States Marshal at Chicago
served with the so-called "W. J. Turner Co." for the collection
of a guard house at Indianapolis, Indiana, the Turner Co. giving
a bond, with the plaintiff as surety, for the faithful performance
of the work. To obtain this bond, application was made to plain-
tiff on the same date. In this application it is stated that
"W. J. Turner Co., the applicant, is an Illinois corporation, or-
ganized in March, 1908; that W. J. Turner is its president, and
that Frank Paschen the secretary, and the application is signed

"W. J. Turnes Co., by Wm. J. Turnes, Pres.," in the handwriting of the defendant. As part of this application the applicant executed an "Agreement of Indemnity," whereby the "W. J. Turnes Co." agreed to pay the plaintiff certain premiums on the bond, and further "it does hereby bind itself, its successors and assigns to indemnify the said The Title Guaranty & Trust Company, of Scranton, Penna., against all loss, costs, damages, charges and expenses whatever, resulting from any of its acts, default or neglect that said The Title Guaranty & Trust Company, of Scranton, Penna., may sustain or incur by reason of its having executed said bond or any continuation thereof." This "Agreement of Indemnity" was likewise signed "W. J. Turnes Co., by Wm. J. Turnes, Pres.," in the handwriting of the defendant. The name "Title Guaranty & Trust Company, of Scranton, Penna.," was subsequently changed to "Title Guaranty & Surety Company," as it appears in this suit.

Turnes then proceeded with his contract for the construction of the guard house. Subsequently difficulties arose between Turnes and a sub-contractor named Moore, and material men, which culminated in a suit upon the bond above described in the United States Circuit Court for the District of Indiana, in which the plaintiff, the W. J. Turnes Co. and Moore were defendants. The testimony shows that the defendant Turnes was informed as to the suit and was represented in court at the trial. Judgment was rendered in this suit in favor of the material men and against the W. J. Turnes Co. and the plaintiff herein as surety on the bond. Execution was issued on this judgment, and the return of the marshall is to the effect that after diligent search he was unable to find the W. J. Turnes Co. in his district, or any property of said company on which to levy. Thereupon the Surety Company, plaintiff herein, paid the amounts involved in the judgment and also other amounts for court costs and expenses.

Thereafter the present suit was brought upon the "Agree-

W. J. Turner Co., by Wm. J. Turner, Treas., in the handwriting of the defendant. As part of this application the applicant executed an "Agreement of Indemnity," whereby the W. J. Turner Co. agreed to pay the plaintiff certain premiums on the bond, and further "it does hereby bind itself, its successors and assigns to indemnify the said Title Guaranty & Trust Company, of Kentucky, against all loss, costs, damages, charges and expenses, resulting from any of its acts, default or neglect and also the Title Guaranty & Trust Company, of Kentucky, Tenn., may again or incur by reason of its having executed said bond or any continuation thereof." This "Agreement of Indemnity" was likewise signed by W. J. Turner Co., by Wm. J. Turner, Treas., in the handwriting of the defendant. The same Title Guaranty & Trust Company at Kentucky, Tenn., was subsequently changed to "Title Guaranty & Surety Company," as it appears in this suit.

Turner then proceeded with his contract for the sale and disposition of the land house. Subsequently difficulties arose between Turner and a co-defendant named Turner, and eventually the suit was brought in a suit upon the bond above described in the United States Circuit Court for the District of Indiana, in which the plaintiff, the W. J. Turner Co., and Moore were defendants. The record shows that the defendant Turner was indebted to the suit and was represented in court at the trial. Judgment was rendered in this suit in favor of the material men and against the W. J. Turner Co. and the plaintiff herein as surety on the bond. Execution was issued on this judgment, and the return of the marshal is to the effect that after diligent search he was unable to find the W. J. Turner Co. in his district, or any property of said company on which to levy. Thereupon the Surety Company, plaintiff herein, paid the amount involved in the judgment and also other amounts for court costs and expenses.

Thereafter the present suit was brought upon the "Agreement

ment of Indemnity" against "W. J. Turnes Co., a Corporation," to recover these amounts. In answer to interrogatories filed it was disclosed that there was no such corporation in existence. Thereupon the declaration was amended and the action changed to a suit against Wm. J. Turnes as an officer of a pretended corporation, and therefore liable for its debts and liabilities made by him, under section 18, chapter 32, above set forth.

From a consideration of the statute and the decisions thereon, it is clear that plaintiff was required to prove, (1) that the defendant had acted as an officer of the pretended corporation; (2) that there was no such corporation; and (3) that the debt or liability was contracted by the defendant acting as such officer in the name of the corporation. *Loverin v. McLaughlin*, 161 Ill. 417; *Kent v. Clark & Co.*, 181 Ill. 237; *Edwards v. Armour Packing Co.*, 190 Ill. 467.

From the above statement of facts, in connection with these decisions, it manifestly appears that all the elements necessary to make out a case for the plaintiff were proven.

We cannot assent to the claim that the judgment in the United States Court must have been against the defendant personally before it can be said that the statutory "debts and liabilities" apply to him. This is not a suit upon the judgment. The judgment is merely evidence that plaintiff was justified in paying out the amounts it paid out by reason of its being surety upon the bond, and therefore under the terms of the agreement of indemnity it was entitled to be reimbursed.

We are not impressed with the argument based upon the agreement of indemnity dated June 26th, containing the words "by reason of its having executed said bond," while the bond is dated June 27th. This language clearly refers to a future time when the surety may sustain loss by reason of having "executed said bond."

of indemnity" against "J. L. Turner Co., a Corporation," is
nevertheless accurate. In answer to interrogatories filed it was
admitted that there was no such corporation in existence. There-
fore the decision was reversed and the action changed to a suit
against Mr. J. L. Turner as an officer of a pretended corporation,
and therefore liable for its debts and liabilities made by him,
under section 18, chapter 33, above set forth.

From a consideration of the facts and the decisions
therein, it is clear that liability was sustained in favor of the
defendant and noted as an officer of the pretended cor-
poration; (2) that there was no such corporation; and (3) that
the debt or liability was contracted by the defendant acting as
such officer in the name of the corporation. *Boyd v. McLaugh-*
lin, 121 Ill. 417, 121 Ill. 420, 121 Ill. 421, 121 Ill. 422.
Boyd v. McLaughlin, 120 Ill. 427.

From the above statement of facts, in connection with
these decisions, it manifestly appears that all the elements neces-
sary to make out a case for the plaintiff were proven.
We cannot assent to the claim that the judgment in the
United States Court must have been against the defendant person-
ally before it can be said that the statutory "debt and liability"
ties" apply to him. This is not a rule upon the judgment. The
judgment is merely evidence that plaintiff was justified in paying
out the amount it paid out by reason of its being surety upon the
bond, and therefore under the terms of the agreement of indemnity
it was entitled to be reimbursed.

We are not impressed with the argument based upon the
agreement of indemnity dated June 27th, 1901, containing the words "by
reason of its having executed said bond," while the bond is dated
June 27th. This language clearly refers to a future time when
the surety may sustain loss by reason of having "executed said

The claim that the judgment in the United States Court against the W. J. Turnes Co. is res judicata, and that the corporation is liable, and not Turnes individually, is met by the decision in Loverin v. McLaughlin, supra. Furthermore it is evident that the question was neither raised nor in issue in the United States Court. As indicated above, this is not a suit on a judgment, and a transcript of the judgment of the United States Court was properly admitted for a collateral purpose only. Phillips v. Webster, 85 Ill. 146; Turner v. Hause, 199 Ill. 464.

The claim that Lovell while working to bring about a settlement of the differences between Turnes and Moore and material men was acting as the agent of the plaintiff, is not supported by the evidence. Even if this evidence were relevant, it appears that Lovell was acting partially for Turnes, by whom he was paid for his services, and also for Moore, who promised to pay him for his services.

Concluding as we do, that the finding of the trial court was right, and there being no reversible error in the proceedings, the judgment will be affirmed.

AFFIRMED.

October Term, 1911. No.

421 - 17960.

WILLIAM E. MATTERMAN,
Appellant,

vs.

MARY L. TIEMAN, et al.,
Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE MESURELY

DELIVERED THE OPINION OF THE COURT.

182 I.A. 24

This is a creditor's bill filed by William E. Matterman

against Mary L. Tieman and others, seeking to set aside certain conveyances alleged to be fraudulent in that they were made without any valuable consideration. The matter was referred to a master in chancery, who heard evidence and reported his findings and conclusion. His conclusion was that the evidence did not support the allegations in the bill. The cause was heard by the chancellor, who overruled the objections and exceptions to the master's report, if any were filed, and entered an order dismissing the bill for want of equity, from which order Matterman has appealed to this court.

The appellees have moved this court to dismiss the appeal or affirm the judgment for the reason that the abstract does not set forth any objections or exceptions filed against the master's report, either before the master or in the court below. Upon searching the abstract we fail to find any objections or exceptions to the master's report, although we may reasonably infer from the final order in the case that such were filed. However, as we are not informed as to what these objections and exceptions were, we are unable to pass upon the correctness of the order of the chancellor overruling the same.

It is also urged that the evidence has not been preserved by a certificate of the chancellor. We do not understand this to be necessary in a chancery case where there is a report of a master

OFFICE OF THE
SHERIFF

U.S. DEPT. OF JUSTICE
WASHINGTON, D.C.

RECEIVED

NOV 1 1911

AS. A. 187

THIS IS A CERTIFICATE OF THE

against the claim of the
movements alleged to be fraudulent in that they were made with
and any similar consideration. The writer was referred to a man
far in company, who heard evidence and reported the findings and
conclusion. His conclusion was that the evidence did not support
the allegations in the bill. The writer was heard in the chambers
the receiving the objections and accepting in the writer's report.
it was very clear, and ordered an order discharging the bill for want
of equity. From which order judgment was appealed to this court.
The appellate court found this court to be correct in the appeal.

On appeal the judgment of the court that the charges were not
true and objections to suspension filed against the master's pay
were, either before the court or in the court below. Upon appeal
and the court we find no error in the objections to suspension in
the master's report, although we are seriously troubled by the fact
evident in the case that such was true. However, as we are not in
power to do that these objections and suspension were, we are not
able to give upon the correctness of the action of the court.

Respectfully,
The Court.

It is also noted that the evidence has not been presented
by a certificate of the court, so we are unable to do so
be necessary in a summary case where there is a report of a master.

in chancery. The master's report is a part of the record. "No bill of exceptions in a chancery cause is either necessary or proper, unless it be to preserve oral evidence introduced upon the hearing, under the statute allowing that to be done." *Ferris v. McClure*, 40 Ill. 99. See also *Ohman v. Ohman*, 235 Ill. 632.

For the failure to include the objections and exceptions to the master's report in the abstract of record, the decree must be affirmed. However, we may add that we have given consideration to the merits of the cause, and are of the opinion that the order dismissing the bill was in accordance with equity.

AFFIRMED.

is necessary. The master's report is a part of the evidence. It will be considered in a moment when it comes to the hearing, unless it is to produce that evidence independent from the hearing. Hence the witness allowed him to be taken to the house of the witness. He will not be taken there if the witness is not there. For the witness is allowed to be taken to the house of the witness. So the master's report in the trial of the witness, the house will be allowed. However, we will not be taken there unless we are taken to the house of the witness, and not to the house of the witness. Otherwise the bill will be considered with equity.

October Term, 1911. No.

462 - 18002

W. E. G. Lancaster, Jr.
appellant.

MARGERETE HENGEN,

Appellee,

vs.

GUSTAVE B. HENGEN,

Appellant.

Appeal from
Circuit Court,
Cook County.

*# Patrick H. O'Donnell and
C. A. Toolen, for appellee; James
Hartnett, for appellant.*

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

152 I.A. 25

This is an appeal from an order of the chancellor in the Circuit Court, allowing temporary alimony of \$150 per month and \$200 solicitor's fees.

Counsel for the husband, appellant here, argue that the charge of adultery made by him in his answer against the wife, if proved, is a bar to any alimony. The most obvious answer is that so far as this record is concerned the charge is not proved. The time for the determination of this issue is upon the trial on the merits; we cannot undertake to settle this controversy now. *Cooper v. Cooper*, 185 Ill. 163. The presumption is that the wife is entitled to alimony. *Harding v. Harding*, 144 Ill. 588. She, having apparently brought her suit in good faith, is entitled to temporary alimony and solicitor's fees.

It is difficult, if not impossible, from the conflicting claims herein to ascertain the truth about the financial ability of the husband. The wife alleges by affidavit that he is rated at about \$800,000, carries \$100,000 of life insurance, and owns a large amount of property consisting of real estate and stocks in railroad and other properties; also that she herself is without any income for her support. The husband admits the ownership of considerable property, but claims that most of it produces no income. It seems improbable that one could have such large investments without being in receipt of an ample income. We cannot say

WANGRETT BERRY,

Appellee,

GEORGE R. WILSON,

Appellant.

Appeal from
Circuit Court,
Cook County.

MR. JUSTICE
DELIVERED THE OPINION OF THE COURT

1891 A. 25

This is an appeal from an order of the chancellor in the Circuit Court, allowing temporary alimony of \$100 per month and \$200 solicitor's fees.

Complaint for dissolution of marriage, signed by the wife, charging adultery made by him in his country residence in 1887, is a bar to any alimony. The most serious matter in this case is the determination of this issue in view of the fact that so far as this record is concerned the charge is not proved. The wife cannot maintain an action for alimony until she has proved adultery. *See* *W. Coates, 1881 Ill. 183*. The prescription to keep the wife in the state of alimony, *Harting v. Harting, 144 Ill. 408*, does not apply. The wife is not entitled to alimony until she has proved adultery. *See* *W. Coates, 1881 Ill. 183*. The prescription to keep the wife in the state of alimony, *Harting v. Harting, 144 Ill. 408*, does not apply. The wife is not entitled to alimony until she has proved adultery. *See* *W. Coates, 1881 Ill. 183*.

It is difficult to see how the wife can maintain an action for alimony until she has proved adultery. The wife is not entitled to alimony until she has proved adultery. *See* *W. Coates, 1881 Ill. 183*. The prescription to keep the wife in the state of alimony, *Harting v. Harting, 144 Ill. 408*, does not apply. The wife is not entitled to alimony until she has proved adultery. *See* *W. Coates, 1881 Ill. 183*. The prescription to keep the wife in the state of alimony, *Harting v. Harting, 144 Ill. 408*, does not apply. The wife is not entitled to alimony until she has proved adultery. *See* *W. Coates, 1881 Ill. 183*.

that the amounts allowed are so excessive, from what is before us, as to warrant the interference of the Appellate Court upon the ground that the discretion reposed in the Circuit Court has been abused.

The decree for alimony pendente lite and solicitor's fees will be affirmed.

AFFIRMED.

that the amount claimed was not excessive, that it was not
as to the amount the interference of the Appellate Court upon the
system and the discussion reported in the Circuit Court has been
shown;
The Court has already rendered this and will render the
law will be affirmed.

REVEREND

rch Term, 1912, 44,

287 - 18327.

O. F. BROWDER,
Appellee,

vs.

THE NORTHWESTERN GAS LIGHT
AND COKE COMPANY,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

182 I.A. 26

O. F. Browder, hereinafter called plaintiff, recovered a judgment against the Northwestern Gas Light and Coke Company, hereinafter called the defendant, in a suit for damages for personal injuries. The defendant has appealed to this court.

The accident occurred as follows: One Nelson, a servant of the defendant, went to the residence of plaintiff (the first floor apartment) to stop a leak of gas at the meter, which was located in the basement. To reach the basement he raised a door in the floor of the kitchen, and descended by a stairway. This door was about 16 or 17 inches from the outside door to the kitchen. After repairing the leak Nelson went to the apartment on the second floor to connect a gas stove, leaving this basement door in the kitchen open. Plaintiff, returning home at noon for his dinner, entered through the kitchen door and stepped and fell into the open basement door, receiving the injuries complained of.

This brief statement is sufficient to justify the conclusion that the defendant, through its servant, was negligent as charged.

It is argued that plaintiff was guilty of contributory negligence in failing to observe the open door in the floor. We cannot say, as a matter of law, that his conduct in this respect amounted to negligence. It was peculiarly for the jury to pass upon. The jury had before it the evidence that the day was bright

Case No. 10000
1900

O. W. Brown
vs.
The Western Gas Light
and Coke Company
Appellant.

MR. PRESIDING JUDGE ROBERTS

10000

O. W. Brown, hereinafter called plaintiff, recovered a judgment against the defendant and Light and Coke Company, hereinafter called the defendant, in a suit for damages for personal injuries. The defendant has appealed to this court. The accident occurred as follows: One Nelson, a servant of the defendant, went to the residence of plaintiff (the first floor apartment) to stop a leak of gas at the water, which was located in the basement. To reach the basement he raised a door in the floor of the kitchen, and descended by a stairway. This door was about 18 or 19 inches from the outside door to the kitchen. After repairing the leak Nelson went to the apartment on the second floor to connect a gas stove, leaving this basement door in the kitchen open. Plaintiff, returning home at noon for his dinner, entered through the kitchen door and stepped and fell into the open basement door, receiving the injuries complained of. This brief statement is sufficient to justify the conclusion that the defendant, through its servant, was negligent in

It is argued that plaintiff was guilty of contributory negligence in failing to observe the open door in the floor. We cannot say, as a matter of fact, that his conduct in this respect amounted to negligence. It was peculiarly for the jury to pass upon. The jury had before it the evidence that the gas was bright

and sunny; that the interior of the kitchen was dark, on account of window shades and the foliage of surrounding trees, while the other doors thereto were closed. It is within the experience of all that one stepping from out of doors, where there is bright sunlight, into a dark room is temporarily unable to discern objects distinctly. When plaintiff left home that morning the basement door was closed, and he says it was never open when he came home.

A special interrogatory was submitted to the jury as follows: "Was the fact that the trap door in question was open a fact which was open, obvious and apparent to a reasonably prudent person, in the exercise of ordinary care?" To this the jury answered, "No."

In view of all the above circumstances and others which appear in evidence, we cannot say that the conclusion of the jury in this respect was not justified.

The first instruction criticised does not convey the meaning claimed for it by defendant's counsel. The words "negligence, if any," as used therein simply mean that the court would not have the jury infer that the court assumed the defendant guilty of negligence. Other instructions clearly show that the only negligence for which there could be a recovery was that charged in the declaration.

There is more force in the point made against the instruction that "The plaintiff had a right to presume that the defendant would use ordinary care in the use of the trap door in question * * * the plaintiff would have a right to presume that the defendant would close down the trap door and leave it in the same condition in which the defendant found it." It is not the law that one can rely solely upon the presumption that others would do their duty ^{so} as to relieve him from the obligation of exercising ordinary care for his own safety. *Schlauder vs. Chicago & Southern*

and sunny; that the interior of the kitchen was dark, on account of window shades and the foliage of surrounding trees, and that the light there was dim. It is within the experience of all that one stepping from day or noon, where there is bright sunlight, into a dark room is temporarily unable to discern objects distinctly. When Plaintiff left home that morning the basement door was closed, and he says it was never open when he came home.

A special investigation was submitted to the jury as follows: "Was the fact that the trap door in question was open a fact which was open, obvious and apparent to a reasonably prudent person in the exercise of ordinary care?" To this the jury answered, "No."

In view of all the above circumstances and others which appear in evidence, we cannot say that the conclusion of the jury in this respect was not justified.

The first instruction criticized does not convey the meaning intended for it by defendant's counsel. The words "negligence," as used therein simply mean that the court would not have the jury infer that the court assumed the defendant guilty of negligence. Other instructions clearly show that the only negligence for which there could be a recovery was that charged in the

There is more force in the point made against the instruction than that "The plaintiff had a right to presume that the defendant would exercise ordinary care in the use of the trap door in question and the plaintiff would have a right to presume that the defendant would close the trap door and leave it in the same condition in which the defendant found it." It is not the law that one may rely solely upon the presumption that others would to their duty to relieve him from the obligation of exercising ordinary care for his own safety. *Schlesinger vs. Chicago & North*

Traction Co., 253 Ill. 154. But this instruction hardly goes that far, and in view of the many other instructions given to the effect that any want of ordinary care by the plaintiff for his own safety would bar a recovery, we do not believe the jury could have been misled. Whatever might be our opinion on this instruction in another case involving different circumstances and instructions, we are not inclined in this case to hold that the giving of this instruction was reversible error.

It is argued at considerable length that the trial court made erroneous and improper remarks and rulings of sufficient importance to compel a reversal. We have given careful consideration to this claim, and cannot give assent thereto.

Considerable argument is predicated upon the assumption that if it should appear that Mrs. Browder, the wife of the plaintiff, was jointly responsible with Nelson for leaving the door open, the defendant would be relieved of any liability for its negligence. We do not understand it to be the law that the negligence, if any, of Mrs. Browder could be imputed to the plaintiff so as to relieve the defendant, and furthermore there is no evidence in the record tending to show that Mrs. Browder had anything to do with leaving the door open.

No argument is made that the amount of the verdict is excessive. It does not seem to be denied that plaintiff received considerable injury, and even if the physician who examined him for the purpose of testifying did base his opinion partly upon subjective symptoms, we do not see that the defendant was harmed thereby.

It also appears from the record that a considerable part of this witness' testimony was stricken out by the court, including his opinion that the plaintiff had epilepsy, which opinion, it was claimed, was based upon subjective symptoms.

...and this instruction hardly goes to the
...in view of the many other instructions given to the jury
...of ordinary cases by the plaintiff for his own
...a recovery, we do not believe the jury could have
...that they should be on their guard in this regard.
...different circumstances and instructions,
...in this case we hold that the giving of such
...instructions was entirely proper.
...it is argued that the instructions were not given
...and proper reasons and rulings of the trial judge
...to be given a verdict. We have given careful consideration
...and cannot give another opinion.
...considerable argument is presented from the defendant
...it is argued that Mrs. Howard, the wife of the plaintiff
...jointly responsible with her for leaving the door
...the defendant would be relieved of any liability for the
...it is not intended to be the law that the plaintiff
...it says, it says, it says, it says, it says, it says,
...to relieve the defendant, and further that there is no
...in the record showing that the defendant was negligent
...as well as leaving the door open.
...No argument is made that the amount of the verdict is
...if it was not to be found that the plaintiff was
...and even if the plaintiff was negligent the
...of liability in this case the opinion of the
...is not that the defendant was negligent.
...It also appears from the record that a considerable part
...of the plaintiff's testimony was rejected and by the jury. In
...ing his opinion that the plaintiff was negligent, which opinion
...it was claimed, was based upon objective symptoms.

Holding as we do, that the verdict of the jury was fully justified by the evidence before it, and finding no reversible error upon the trial, the judgment will be affirmed.

AFFIRMED.

... as we go, about the vicinity of the ...
... of the evidence before us, and finding no reversible
... the trial, the judgment will be affirmed.

...
...

March Term, 1912, No.
322 - - 18,362.

JOHN REGAN,
Appellant,

vs.

THE EXCELSIOR PRINTING
CO., (a Corporation)
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

*Charles P. Whitman for
appellee.*

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

182 I.A. 27

Appellee has moved in this cause that the bill of exceptions be stricken from the record, for the reason that it was not tendered to the judge within the time provided by statute.

This is a first class case from the Municipal Court. A bill of exceptions should be tendered to the judge in such a case within sixty days after the entry of the final order or judgment, or within such further time thereafter as the court, upon application made therefor within such sixty days, may allow. The judgment herein was entered on October 9, 1911. The sixty days allowed by the statute expired on December 8, 1911. An inspection of the bill of exceptions shows that it was signed by the judge on December 11, 1911 and filed December 12, 1911. The order to strike must therefore be allowed.

There being no errors in the common law record, the judgment must be affirmed.

We might also add, that the abstract of record filed by appellant is printed in type smaller than that provided for in Rule 19 of Appellate Court Rules, and therefore could not be considered by this court.

The judgment will be affirmed.

AFFIRMED.

*Joel H. Stevens and John
M. Lonnegan, for appellant.*

THE COURT
IN THE
MATTER OF
THE ESTATE OF
JAMES H. HARRIS
DECEASED

THE COURT'S DECISION

11-11-11

Appellant has moved for this court that the bill of
exceptions be stricken from the record. For the reason that
it was not rendered on the judge's return and also provided by
the court.

This is a first class case from the Municipal Court.
A bill of exceptions might be rendered in the judge's room
a week or more after the entry of the final order or
judgment, or within such further time thereafter as the court,
upon application made therefor within such time days, may allow.
The judgment herein was entered on December 11, 1911. The clerk
says allowed by the court on December 11, 1911. The
petition of the bill of exceptions was filed on December 11, 1911.
by the judge on December 11, 1911 and filed December 11, 1911.
The error to strike such judgment be allowed.

There being no error in the decision of the court, the
judgment must be affirmed.

We also said, that the statement of facts filed
by appellant is printed in type smaller than that provided for
in Rule 12 of Appellate Court Rules, and therefore would not
be considered by this court.

The judgment will be affirmed.

March Term, 1912, No.
334 - 18374.

CLARENCE A. G. KUIPERS,
Appellee,

vs.

MATH. THOME,
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT

182 I.A. 28

Clarence A. G. Kuipers, appellee, while a minor, met Math. Thome, appellant, and after negotiations entered into a business agreement with him. Thome was engaged in the manufacture and sale of toilet preparations and kindred articles. Appellee paid him \$1,000 for a half interest in the business. Afterwards, becoming dissatisfied with the business, appellee filed this bill, by Annie E. Kuipers, his next friend, praying that the contract entered into between him and appellant be rescinded and be declared null and void, and that he be decreed a return of the \$1,000 invested by him.

The matter was referred to a master in chancery who, after hearing witnesses and arguments, reported finding that appellee was entitled to the relief prayed for. Upon this finding a decree of court was entered in accordance with the recommendations of the master, and that appellee was entitled to recover from appellant the sum of \$1,000. From this decree appellant has appealed to this court.

The position of the appellee is that, being an infant and having advanced money upon a contract voidable because of his infancy, he is entitled to repudiate it and recover moneys advanced by him. This position seems to be fully supported by the decision in *Wuller v. Chuse Grocery Co.*, 241 Ill. 398. A reading of this decision shows that it meets almost every point

*Thornston & Chancellor, for
appellant.*

Albert Lutz, for appellee.

The decision in *United States v. Galt*, 191 F.2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 9

made by appellant against the decree.

It is asserted by counsel for appellant that the issue raised by the pleadings was fraud and not infancy, but we do not understand this to be the case. A perusal of the bill discloses clearly that the basis of the bill was the infancy of the complainant, and that Math. Thome, the defendant therein, knew of such infancy. The averments concerning fraud and misrepresentation were not necessary to entitle complainant to the relief sought.

We find nothing to support the claim that the appellee's mother was the real party in interest. He may have received the money from his mother and afterwards returned it to her, but the evidence clearly shows that it was his own enterprise.

As to the point that the minor has not shown restitution, the master found to the contrary, and the evidence amply supports this finding.

There is no force in the point that appellee is estopped to rescind the partnership agreement because he concealed his infancy at the time of making the contract. The master finds, in effect, that the appellant, Thome, had knowledge of appellee's infancy at the time of making the contract, and in any event we are referred to no authority that ignorance of one party to a contract of the infancy of the other party at the time of making it is a bar to the exercise of the infant's right to repudiate.

Believing as we do, that the decree is in accordance with the law and the facts, it will be affirmed.

AFFIRMED.

test by appellant against the answer.

It is insisted by counsel for appellant that the answer
relies by the plaintiff was from the testimony, and as it was
understood this to be the case. A paragraph of the bill discloses
clearly that the basis of the bill was the testimony of the com-
plainant, and that said. There, the defendant therein, from of
which interest. The testimony of the plaintiff and witness-
him was not necessary to enable compliance to the relief
sought.

As this motion is supported the claim that the complainant's
motion was the real party in interest. As they have received the
money from his mother and respondent returned it to her, but the
relieve clearly shows that it was his own money.
As to the point that the money was not shown possession,
the answer found in the testimony, and the evidence fully supports
this finding.

There is no force in the point that appellee is obligated
to rescind the partnership agreement because he removed his in-
terest at the time of making the contract. The answer shows, in
effect, that the appellant, Thomas, had knowledge of appellee's
intention at the time of making the partnership, and in any event he
was satisfied as to the authority that knowledge of one party to a
partnership of the intention of the other party at the time of making
it is a bar to the rescission of the contract in remission.
Believing as we do, that the facts in the case are
with the law and the facts, it will be affirmed.

W. H. H.

March Term, 1912, No. 7

341 - 18381.

JOHN MCCARREN,
Appellee,

vs.

A. ISAAC RADZINSKI, et al.
On appeal of WILMER A. RAD-
ZINSKI, Admr. Est. A. Isaac
Radzinski, deceased.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Jacob C. Le Boeuf and
J. D. Hurley, Jr. Appellants.

MR. PRESIDING JUSTICE MCURELY

DELIVERED THE OPINION OF THE COURT.

182 I.A. 29

This is an appeal from a judgment for \$5,000 in

a suit to recover damages for personal injuries received by McCarren (hereinafter called plaintiff), caused by a part of a derrick or hoisting crane falling upon him, while he was engaged as a worker upon a building in process of erection belonging to A. Isaac Radzinski (hereinafter called defendant).

Pending the disposition of this cause upon appeal A. Isaac Radzinski died, and his death being suggested, an order was entered substituting the name of Wilmer A. Radzinski, administrator of his estate, as the appellant herein.

The declaration was filed August 31, 1910, and summons served upon the defendant returnable to the October term. Failing to file an appearance the defendant was defaulted on November 16, 1910. Sometime thereafter a motion was made by the defendant to set aside this default. The abstract does not disclose when this motion was made, but counsel for plaintiff states that it was made after this term of court had passed, and this seems to be confirmed by the record. This motion was denied and by agreement the cause submitted to the court for the assessment of damages, which were assessed at \$5,000 and judgment entered upon the finding, from which judgment the defendant, Radzinski, has taken this appeal.

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The declaration is based upon the statute entitled "An Act providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges, viaducts and other structures, and to provide for the enforcement thereof," in force July 1, 1907, Hurd's Statutes, 1912, page 1124. It is argued by the defendant that this act was not designed to apply to an owner of property, except when he is in charge of the building. The opinion in Glaffy v. Chicago Dock Co., 249 Ill. 210, is said so to hold. On the other hand, counsel for plaintiff cites the Glaffy case as authority for the claim that both the owner and contractor are liable under the statute irrespective of the question of the control of the building. Without discussing what was said in the Glaffy case on this point, it is sufficient to say that we find in that case a clear expression of opinion that if the owner never parted with the control and supervision of the building to any contractor, the owner is liable. Turning, therefore, to the declaration to ascertain what allegation of fact appears touching this point, we find nothing which, even by inference, could be construed as an allegation that the owner had parted with the control and supervision of the building. We do find, however, an affirmative allegation wholly inconsistent with such inference, to-wit: the allegation that the defendant "erected and constructed for use in the erection of the house or building * * * a certain derrick in such a manner, so that the same was not erected and constructed in a safe, suitable and proper manner". Considering this allegation to be admitted by the failure of the defendant to appear, this branch of the case clearly comes within the principle announced in the Glaffy case, where the court found that the owner was in control of the building.

It is very earnestly urged that the declaration sets up conclusions only and not facts and that, therefore, the default

admits nothing. There is no doubt that a default admits only what is properly alleged. The declaration follows almost verbatim the language of the statute in that it alleges substantially a duty to construct the contrivance in question in a safe, suitable and proper manner and to be so erected * * * so as to give proper and adequate protection to the plaintiff who was employed thereon or passing under or by the same, and in such a manner as to prevent the falling of any material to be used or disposed thereon, and further that the defendant failed to comply with the provisions of said statute, but erected the hoist or crane in such a manner as not to give proper protection to the plaintiff who was then and there employed or engaged thereon or passing under or by the same, and further that by reason of this failure the derrick suddenly and without warning fell away from the contrivance or device known as a horse to which it was then and there attached, and that by reason thereof the horse struck the plaintiff and injured him. While it is true that the declaration might have made more clear the details of the construction of the derrick, with special reference to the manner of attaching the derrick to the horse, and that in this respect the declaration could easily have been made more particular by an amendment, it does not necessarily follow that, as it stands, it does not state a good cause of action.

The language of the Supreme Court in Buck v. Citizens' Coal Mining Co., 254 Ill. 198-201, is applicable here:

"The declaration is not a model pleading, but the most that can be said of it is, that it is a defective statement of a good cause of action. Giving its language its ordinary meaning and significance, there is no reasonable basis for saying it did not state any cause of action, or that plaintiff in error was not advised by its allegations of the nature and grounds of the demand against it. A party who voluntarily submits to a default impliedly admits that the demand against him is just and that he has no defense. (Lucas v. Spencer, 27 Ill. 15.) That the

declaration would have been obnoxious to demurrer if one had been interposed would not necessarily justify reversal of a judgment rendered by default. (Alton Illuminating Co. v. Foulds, 150 Ill. 337.) A default judgment will be reversed where the declaration states no cause of action, but a defective statement of a good cause of action is cured by verdict. Plaintiff in error having submitted to a judgment by default, is not in a position to ask the benefit of technical refinement in construing the language of the declaration for the purpose of enabling it to escape the legal consequences of its own neglect."

We are also of the opinion that the omission of any allegation in the declaration of due care on the part of the plaintiff is unimportant. Carterville Coal Co. v. Abbott, 181 Ill. 495. In the case of Brown v. Siegel Cooper & Co., 191 Ill. 226, the Carterville Coal Co. case was distinguished in that the statute involved in the Carterville case itself creates a liability for any injury to persons occasioned by any willful violation of it, or wilful failure to comply with its provisions, the court saying, page 235:

"For any willful injury, the lack of ordinary care or contributory negligence on the part of the one injured is no defense."

Referring then to the statute before us, we find a similar provision creating a liability occasioned by any willful violation of this act. The declaration alleges that the defendant willfully violated this statute, and therefore, we conclude that the decision in the Carterville Coal Co. case is controlling upon this point.

We cannot agree with the claim that the evidence shows that a settlement was made by the plaintiff with other defendants. The plaintiff testified that he made no settlement. As was said substantially in C. & A. Ry. Co. v. Averill, 224 Ill. 516, when there are two or more tort feorsers, a covenant not to sue one does not release the other tort feorsers. In Wallner v. Consolidated Traction Co., 245 Ill. 142, the money received by the plaintiff was in settlement for the injuries; that is not

the situation here.

Other points presented by defendant have been duly considered, but we are not moved thereby to conclude that the judgment should be reversed.

Finding no ground for reversing the judgment herein it will be affirmed.

AFFIRMED.

the opposite side.

There being nothing in the way of this

being done, it is not worth the trouble of doing it.

It is not worth the trouble of doing it.

It is not worth the trouble of doing it.

It will be sufficient.

It will be sufficient.

March Term, 1912, No.
367 - 18410.

MAGGIE ROBINSON,
Appellee,

vs.

CHICAGO CITY RAILWAY
COMPANY,
Appellant.

W. H. Robinson & L. A. Brown, for appellant; L. A. Buehly, counsel.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Patterson & Shaw, for appellee; William H. Holly, counsel.

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

182 I.A. 33

This is an appeal from a judgment of \$1,500 recovered by appellee, hereinafter called plaintiff, on account of personal injuries received by her while a passenger on one of appellant's (defendant's) cars, from which she fell while alighting therefrom at 49th and State streets, in Chicago.

The declaration charges that defendant stopped its northbound car at the intersection of State and 49th streets, and while she, in the exercise of due care, was attempting to alight therefrom, the defendant caused said car to be suddenly started, thereby throwing off plaintiff and injuring her.

Defendant contends there is no evidence legally tending to show the negligence alleged. We cannot so conclude. Plaintiff, although guilty of many minor inaccuracies, testified in substance that as the car was standing and she was in the act of alighting, the conductor rang the bell, the car started up, and she fell, receiving the injuries complained of.

It is further contended that the verdict is manifestly against the weight of the evidence. We have weighed the evidence touching the occurrence, and have reached the conclusion that the jury was justified in finding that the greater weight of the evidence was with the plaintiff.

Page 10

Exhibit 10

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This is an appeal from a judgment of the court

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Complaint is made of the refusal of the trial court to give instruction No. 2 tendered by the defendant, and of the court's modification of defendant's instruction No. 21. The two instructions are similar in principle, and it is obvious that the trial court simply combined them by insertingⁱⁿ instruction No. 21 an element contained in defendant's instruction No. 2; therefore, giving instruction No. 21 as modified was practically the same as giving both Nos. 2 and 21 tendered by defendant. Defendant will not be heard to assert as error the giving of an instruction it had requested.

Finding as we do, that the verdict was proper, and there being no error committed^{up} on the trial, the judgment will be affirmed.

AFFIRMED.

considered in view of the fact that the same is

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March Term, 1912, No.
380 - 18425.

FREDERICK BAUSMAN, Trustee in
Bankruptcy of the ALASKA SMELT-
ING COMPANY,

Appellee,

vs.

JOHN A. MEAD, et al., on appeal
of CARL B. HINSMAN,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

(182 I.A. 35)

STATEMENT OF FACTS. This is an appeal from a judgment against Carl B. Hinsman in an action of debt on a penal bond given by John A. Mead as principal, and Carl B. Hinsman as surety, to Frederick Bausman as trustee in bankruptcy of the Alaska Smelting Company, in connection with the sale of a smelter belonging to the said bankrupt, made in pursuance of an order of the United States District Court for the Western District of Washington, in the matter of said Alaska Smelting Company, bankrupt, No. 3547.

The smelter, which was the only property of the bankrupt, was incumbered by a mortgage given to secure a bond issue of \$300,000. At or about the time the Smelter Company was adjudged bankrupt, which was in October, 1907, Bausman, the trustee in bankruptcy, and a Mr. Gould, the attorney for Mead, who was the owner of a large part of said bond issue, and a Mr. Blanc, representing a creditor who had advanced about \$50,000 to the bankrupt, met in New York City, and the statement was then made that the trust deed given to secure said bonds was invalid and that the bonds were invalid, and that this creditor represented by Mr. Blanc would insist upon proceedings being instituted to have said trust deed and bonds adjudged void. A short time thereafter Gould met Bausman in Seattle, Washington, and the trustee stated that he could not continue carrying the smelter, and that he would insist

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upon being given authority to sell it; that if Mead chose to bid upon the property, he would consent to an order that his bonds be allowed at 33-1/3% of their face value as part of the purchase price, upon the assumption that said bonds were valid, provided Mead would give an indemnity bond in the sum of \$20,000, which it was thought would be sufficient to meet the claim of \$50,000 held by Mr. Blanc's client; so that if the proceeding to set aside the trust deed should be instituted and prevail, such creditor would be equal or superior in rank to Mead, and said indemnity bond should be held for the common benefit of every legal creditor of the bankrupt.

Upon that statement and upon the entry of an order providing for the sale of the smelter, Gould stated that he would advise the giving of the bond conditioned to meet the claim of any lawful creditor, if that creditor should prove his equality or priority to Mead's claim. Accordingly an order of sale of said property was entered on March 21, 1906, directing the sale of the property, providing that the bidder whose bid should be accepted should pay all of the remainder of his bid above \$6,000 either in cash or in mortgage bonds at 33-1/3% of their face value, and that if the successful bidder should tender such mortgage bonds in payment of the balance of the bid, in lieu of cash, and his bid should be accepted, he should furnish security for the payment of creditors in the sum of \$20,000.

On April 7, 1906, the bid of Mead for said property of \$87,000, payable \$6,000 in cash and the balance by the surrender of mortgage bonds of the face value of \$243,000, was accepted, said bonds being received as part of said purchase price on the basis of 33-1/3% of their face value, or \$81,000. The penal bond in the sum of \$20,000, as agreed upon, was executed and approved by the court, and a conveyance was thereupon made by the trustee to Mead of the said property, free and clear of said \$300,000 mortgage bonds.

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Along with these issues, however, the relationship of climate change to

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by maintaining fiscal prudence for 20 years, we can afford to work with all 50 states.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Improving all of these will require a more robust and integrated approach to the management of the system.

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The bond in question runs to Frederick Bauman, as trustee in bankruptcy of the Alaska Smelter Company, and after reciting the order authorizing the sale of the smelter, as aforesaid, and the bid of Mead and the acceptance thereof, concludes with the condition that -

"If the above bounden Mead shall pay, or cause to be paid, to any persons, firms or corporations that are now or hereafter shall become legal creditors of the bankrupt, Alaska Smelting Company, whatever pro rata sum may be adjudged to be due to them out of the proceeds of the sale of the bankrupt's smelter, to the same extent and with the same punctuality that the same would have been paid as a dividend to them or otherwise by the order of the court, out of the fund in court, had the purchase price been paid in cash, instead of in mortgage bonds (provided, however, that all persons who may hereafter seek to avail themselves, or cause the Trustee to avail himself on their behalf, of any liability in their favor or that of the Trustee by reason of this obligation, shall cause to be instituted in cause number 8847 the question of any equality or priority upon their part over or with the mortgage bonds aforesaid as creditors of the bankrupt, on or before the 31st day of January, 1909), this obligation shall be null and void; otherwise to remain in full force and effect."

The breach of said obligation assigned in the declaration is that one Hamilton Borden was a person who was a legal creditor of the said bankrupt, and that he caused to be instituted in cause No. 8847 the question of equality and priority on his part, over or with the mortgage bonds in said writing mentioned, as a creditor of said bankrupt, and that thereafter, on January 3, 1910, it was determined and adjudged that he was the owner and holder of seven coupon bonds of the same series as that mentioned in said writing and secured by the same mortgage; that on January 30, 1909, Borden filed his petition, together with his proof of debt on said bonds, seeking to avail himself, and seeking to cause the trustee to avail himself on behalf of said Borden, of the liability in favor of said Borden by reason of said writing obligatory, and instituted in said cause the question of equality on the part of said Borden with the \$248,000 mortgage bonds surrendered by said Mead to the trustee aforesaid, and that a copy of said order duly certified by the

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multivariate and bi-variate models. The results are discussed in the context of the literature.

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clerk of said court was sent by mail by said clerk to said trustee and to the attorney for John A. Mead, and to Mead personally, and to said Carl B. Hinman, and that it was by said court on January 3, 1910, determined that Borden was a creditor of said bankrupt in the sum evidenced by seven coupon bonds of \$1,000 each, dated October 1, 1903, with interest at six per cent. per annum, and was, as such creditor, of the same rank as said Mead, and that said Borden was entitled to receive his pro rata share of the purchase price of said property to the same extent and with the same punctuality as if said purchase price of \$87,000 had been paid in cash, and that said Borden has not received his pro rata share of said purchase price of said property, or any portion thereof, or any other sum or sums, as dividends, or otherwise, in said cause.

The same averments are made with respect to William J. Selleck, with a like finding that he was the owner and holder of ten coupon bonds of \$1,000 each, and that he also was entitled to receive his pro rata share of the purchase price of said property, and that he had not received such share.

The action is in the name of Sausman, as trustee, for the sole benefit of Borden and Selleck, none of the other bondholders and no unsecured creditors appearing to claim any rights under said bond.

The defendant Hinman only was served, who filed plea to the declaration, setting up, first, that prior to the commencement of this suit the estate of said bankrupt was settled and plaintiff discharged as such trustee. This plea was denied by plaintiff by replication, and issue was joined thereon. A second plea averred that said Borden and Selleck were not at the time said bond was executed, and did not thereafter at any time prior to the commencement of this suit become legal creditors of said bankrupt, and issue was joined on this plea.

The evidence introduced by the plaintiff consisted of an exemplified copy of the bond sued on, and exemplified copies of two orders of the United States District Court of Washington in re Alaska Smelting Company, bankrupt, entered upon the petitions of said Borden and Selleck, respectively, purporting to find that said Borden and Selleck were holders and owners, one of seven and the other of ten bonds of \$1,000 each of said bankrupt, part of the aforesaid total issue of \$300,000. Said orders, after reciting the sale to Mead and the transfer to him of the property of the bankrupt, further found that said Borden and Selleck have been creditors of the bankrupt and are entitled to receive their pro rata share of the purchase price of said property to the same extent and with the same punctuality as if said purchase price of \$87,000 had been paid wholly in cash, instead of \$81,000 thereof having been paid in mortgage bonds.

Neither Mead nor Hinaman appeared or took any part in the proceeding in which these orders were entered.

The introduction of said exemplified copies of these orders was objected to by the defendant Hinaman, on the ground that they were not binding upon him as he was not a party to the proceeding in which they were entered, and also for the reason that the court had no jurisdiction over the subject-matter at the time said orders were entered, which was more than a year after the adjudication in bankruptcy, and that said orders were not legal proof that said Borden and Selleck were creditors of said bankrupt.

At the conclusion of the evidence the defendant submitted to the court certain propositions of law, which were refused, and thereupon the court entered a finding for the plaintiff against the defendant for debt in the sum of \$20,000, damages in the sum of \$8,825.25, said debt to be discharged upon the payment of damages.

Sauley & Webster, for appellant.

Ratty Bros. and Charles Hudson, for appellee.

-8-

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Conceding, for the purposes of this opinion only, that the plaintiff is entitled to recover on the bond in question, in the form in which this suit was brought, it is manifest that no such judgment as was rendered herein could properly be entered. The bond was for the payment to legal creditors of "whatever pro rata sum may be adjudged to be due to them." Clearly the rate of the dividend to be distributed among creditors would depend at least upon the amount of proved claims and the amount of assets to be distributed, and the rate of distribution should be fixed by a proper adjudication in the bankruptcy court. So far as appears from the record before us, no rate of distribution was so adjudicated. Therefore, there was no basis for the judgment entered herein. For this reason the judgment must be reversed and the cause remanded.

A special plea and replication put in issue the capacity of Bausman, as trustee, to bring this action, the defendant averring that Bausman had been discharged as trustee prior to the commencement of this suit. Plaintiff in his replication denies this. Upon the trial when the defendant undertook to prove his averment of the discharge of Bausman, he found himself without proper evidence of the same. The record shows a considerable colloquy between court and counsel touching the production in court of a certified copy of the alleged discharge. In the brief and argument before us counsel for the defendant claims that it was admitted by the plaintiff, for the purposes of the trial, that plaintiff was discharged as trustee before the commencement of this suit, and upon this presumption strongly argue that therefore he has no right to maintain this action as such trustee. Counsel for plaintiff in their argument, while joining issue as to the law on this point, do not concede that the discharge, as claimed, is

admitted, but rather question the fact of the discharge, and claim that in any event the date of the discharge was never produced. We do not find in the abstract of record any admission by plaintiff, as claimed by defendant's counsel. The statement by the court that he would require the plaintiff to admit certain things "for the purposes of the trial," cannot be held to be an admission by the plaintiff upon this point. Furthermore, an examination of the statement made by the court fails to show that it contains anything as to the time or date of the alleged discharge of Bauman, so that there appears nothing evidentially or by admission proving the claim that Bauman was discharged as trustee prior to the commencement of the suit. We must therefore decline to pass upon the mere academic question presented.

In the event of another trial, the questions may again arise touching the admissibility and effect of parol testimony concerning the circumstances of the giving of the bond. What should be the ruling of the court thereon will depend entirely upon the particular matter before it at that time, so that no good purpose would be served in commenting upon the parol testimony now before us.

For the reason first above indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

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12-11-68 Page 2 Ill. record Page 11 of 11

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SCHWARZSCHILD & SULZBERGER
COMPANY,

Plaintiff in Error,

vs.

MORRIS SHAPIRO,
Defendant in Error.

4/ William R. Brown, for
appellant.
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

No appearance for
appellee.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

182 I.A. 40

Plaintiff in error brought a fourth class action in

tort in the Municipal Court, alleging in its statement of claim that the defendant, for the purpose of inducing the plaintiff to sell him goods on credit, falsely represented that he was solvent and worth about \$8000 in real and personal property, that plaintiff relied on these statements and sold and delivered to the defendant goods of the value of \$347.88. Defendant filed an affidavit of merits to the whole claim, denying indebtedness to the plaintiff and denying that he had made any untrue representations, asserting that "any claims of whatever nature which the plaintiff had against the defendant were adjudicated in the case between the same parties hereto in the Municipal Court, No. 188447", and that plaintiff "waived any tort he may have had by reason of the institution of a suit in contract, being the one heretofore above referred to". Plaintiff interposed a motion to strike the affidavit of merits from the files, which was overruled upon the ground that the portions of the affidavit above quoted constituted a good defense to the present action. Later the defendant's attorney moved to dismiss the suit "on the ground that the plaintiff had waived its right to bring an action of tort by bringing an action on the contract, as shown by defendant's affidavit of merits". The bill of exceptions states that "no evidence or testimony was introduced on either of said motions", but that

"for the purpose of argument it appeared that a previous judgment was had on an action on the contract in the Municipal Court of Chicago, case #188447, in which these same parties were also parties plaintiff and defendant". Upon this showing or admission the court granted the motion of defendant's attorneys and dismissed the suit "on the ground that the plaintiff by bringing an action on the contract, waived its right of action in tort". This writ of error was sued out to reverse that judgment.

It will be noted that the reason given by the trial court for granting the motion to dismiss is substantially the same as the reason given for denying the motion to strike the affidavit of merits from the files. Plaintiff in error has assigned as error nothing but the rulings of the court upon these two motions.

As the alleged "previous judgment" was not offered in evidence, nor otherwise made a part of the record in this case, we have no means of knowing what the former judgment was, except that somehow, without any evidence, "it appeared for the purpose of argument", that in a prior action "on the contract" between the same parties a judgment of some sort "was had". Whether the judgment was rendered on the merits or otherwise is a matter of conjecture. For aught that appears in this record, the alleged former judgment may have been a voluntary non-suit, or a dismissal upon technical or jurisdictional grounds, or because it was prematurely brought. If the statements contained in the bill of exceptions as to what happened in the trial court be considered as equivalent to a statement that the plaintiff for the purpose of argument admitted everything contained in the defendant's affidavit or plea of a former adjudication to be true, and that upon the basis of that admission, the court sustained the plea and granted the motion to dismiss, the ruling was clearly wrong, because the defendant's plea of former adjudication is manifestly

too vague and uncertain to show, even prima facie, that the alleged former judgment is a bar to the present action. If it could be assumed, without proof, that the former judgment was a judgment on the merits, the plea or affidavit of merits is even then, insufficient as a plea in bar, for it does not state that the former judgment was satisfied. It has frequently been held that the mere recovery, without satisfaction, of a judgment on a contract is no bar to an action for deceit practiced in inducing the plaintiff to make the contract. Standard Sewing Machine Co. v. Owings, 140 N. C. 503; Wanzer v. DaBaum, 1 E.D. Smith, 261; Morgan v. Skidmore, 3 Abb. N.C. 92; Black v. Miller, 75 Mich. 323; Union Cent. Life Ins. Co. v. Schidler, 130 Ind. 214; Morton v. Huxley, 13 Gray 265, 290; Whittier v. Collins, 13 R. I. 90. The rule that after verdict and judgment it will be presumed that proof was made of facts defectively stated in the pleadings cannot be applied in this case, for the reason that the bill of exceptions affirmatively states that no evidence of any kind was introduced, and the only admission of record is as above stated.

The theory upon which the court evidently acted in holding that "the plaintiff by bringing an action on the contract waived its right of action in tort" was evidently the theory that there had been an election of remedies by the plaintiff. The doctrine of election of remedies, however, only applies where the remedies are inconsistent. If co-existent remedies are consistent with each other, the plaintiff "may adopt all or select any one which he thinks best suited to the end sought, and only the satisfaction of the claim in one case constitutes a bar in the other". Bradner Smith & Co. v. Williams, 178 Ill. 420, 427. The remedy by action in tort for fraud and deceit in the purchase of goods is not inconsistent with the remedy by action on the contract for the purchase price or value of the goods bought, for both

actions proceed upon the theory of an affirmation of the contract by the plaintiff. In Brumbach v. Flower, 80 Ill. App. 219, it was held that a defrauded vendor, by bringing assumpsit to recover the price of goods obtained through purchase by fraudulent means, was not precluded from dismissing the assumpsit suit and thereafter maintaining case for deceit in inducing the vendee to make the contract of sale. The Supreme Court affirmed this doctrine in the same case upon appeal from a later trial. Flower v. Brumbach, 181 Ill. 846. In Anderson v. Chicago Trust & Savings Bank, 195 Ill. 341, the court said of the two decisions in the Brumbach case, that the effect of those decisions was to hold "that assumpsit for purchase price and case for deceit in inducing the sale are not based upon conflicting positions, as neither is in disaffirmance of the contract". It is true that in the Appellate Court opinion in the Brumbach case, supra, Mr. Justice McAllister said that "if the action in assumpsit had gone to judgment it would probably have been a bar to the action for the fraud"; but that statement was not necessary to the decision in that case, and in so far as it may seem to suggest any general rule as to election of remedies, or estoppel by judgment without satisfaction, it is opposed to the rule announced later by the Supreme Court in the case of Bradner Smith & Co. v. Williams, supra. Moreover, in this case it is evident that the trial court held that regardless of the kind or character of judgment rendered in the prior action, the mere fact that a prior suit was begun on the contract constituted an election and was, alone, a sufficient bar to an action for the tort. In Garrett v. Farrell Co., 190 Ill. 435, the court said, (p.441): "The institution of a suit will not be held such a decisive act as to constitute a waiver of rights which would be inconsistent with the maintenance of such suit (1) if the court in which the first action was brought had no jurisdic-

tion to try the cause; (2) if the cause of action is prematurely brought and is defeated for that reason; (3) if the suitor has in his first action mistaken his remedy and is defeated on that ground; or (4), if an action is commenced in ignorance of material facts which proffer an alternative remedy, the knowledge of which is essential to an intelligent choice of procedure". The affidavit of merits does not negative a single one of the four exceptions thus stated. Hence, even if it could be conceded that the remedies are inconsistent, the affidavit of merits does not state facts enough to show an election of remedies.

For the reasons indicated, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

[illegible]

114 - 17637.

GEORGE R. NEFF,
Defendant in Error,

vs.

FORREST J. ALVIN,
Plaintiff in Error.

*Ernest Saunders and
Frank A. Pamacitte, for
plaintiff in error.*

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

*No appearance for defendant
in error.*

MR. JUSTICE WITCH DELIVERED THE OPINION OF THE COURT.

182 I.A. 41

Plaintiff in error, the defendant in a suit in attachment in the Municipal court, has sued out this writ of error to reverse a judgment for \$75 entered against him after a trial upon the merits. He contends in this court that "the proceeding is honeycombed with errors", and points out (1) that the affidavit was not sworn to, because the jurat was not signed by the clerk, (2) that the attachment bond is conditioned for the payment of all costs and damages that may be awarded against the defendant, (3) that the writ is dated January 13, 1911, and made returnable "January 19th next", (which counsel say means January, 1912), (4) that the service by publication is insufficient, (5) that the amended affidavit states no ground for attachment, and (6) that "the evidence fails to establish any ground for attachment".

There was no personal service on the defendant, but the record shows that after the period of publication had expired, the "parties" came into court, and on motion of the defendant, the plaintiff was ordered to file a statement of claim within five days. This was a general appearance. Defendant thereby waived all objection to the process by which he was brought into court. Baldwin v. McClelland, 152 Ill. 42. The record also shows that no motion was made to quash the attachment until after the court had heard all the evidence and announced its findings, and apparently the only ground then urged for the motion was the alleged insufficiency of the evidence to support the attachment. Defects of the

114 - 17637.

GEORGE H. NEFF,
Defendant in Error,

vs.

FORREST J. ALVIN,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

No appearance for defendant in error.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

182 I.A. 41

Plaintiff in error, the defendant in a suit in attachment in the Municipal court, has sued out this writ of error to reverse a judgment for \$75 entered against him after a trial upon the merits. He contends in this court that "the proceeding is honeycombed with errors", and points out (1) that the affidavit was not sworn to, because the jurat was not signed by the clerk, (2) that the attachment bond is conditioned for the payment of all costs and damages that may be awarded against the defendant, (3) that the writ is dated January 13, 1911, and made returnable "January 19th next", (which counsel say means January, 1912), (4) that the service by publication is insufficient, (5) that the amended affidavit states no ground for attachment, and (6) that "the evidence fails to establish any ground for attachment".

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EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT A

Plaintiff in error, the defendant in a suit in equity

and in the defendant's favor, the same was not to be given in

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kind here relied on, except the last of those above stated, are mere irregularities, and objections thereto come too late when first made in the Appellate Court. Iroquois Furnace Co. v. Wilkin, 181 Ill. 582; Foley v. Boyer, 188 Ill. App. 613.

As to the alleged defect in the original affidavit it may be said that a jurat is not a necessary part of an affidavit in attachment, when followed by the issuance of a writ, for in such case it will be presumed that the affidavit was in fact sworn to, though not so certified by a jurat. Kruse v. Wilson, 79 Ill. 233; Cox v. Stern, 170 Ill. 442, 448; Bickerdike v. Allen, 187 Ill. 95, 107.

While the evidence as to the alleged concealment of the defendant so that service of process could not be had upon him is not very convincing, still it is not disputed, and, unexplained, tended to prove, we think, such a concealment as the statute contemplates. Cooley v. Jones, 25 Ill. 565.

The judgment will be affirmed.

AFFIRMED.

was investigated, and objectives specified for this work.

1. The following information is being furnished to you for your information:

is the subject of the book.

THE UNIVERSITY OF CHICAGO PRESS

It should be pointed out that the results of the present study are not directly comparable with those of other studies, as the present study was a cross-sectional study, while the other studies were longitudinal studies.

3/14/1976 m. to Jack Thompson a lot of hard work this day

[illegible][illegible]

Alle Rechte vorbehalten. Nachdruck, Vervielfältigung und Verbreitung, auch auszugsweise, ist ohne schriftliche Genehmigung des Verlages.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-14-2013 BY 60322

01-08-1976

will be immediately available with all the necessary data.

Did you and Joe Wilson encounter any other kind of resistance?

San Francisco, California, June 11, 1964. Dear Mr. [redacted]:

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THE JOURNAL OF THE

Journal of the American Medical Association

6. *Chrysomelids*

October Term, 1911. No.

242 - 17,776.

LEONARD SHADBURNE,
Appellee,

vs.

A. SHARBARD,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

*H Richard E. Gavin, for appellant;
Gavin & Mayer and George E.
Lubitz, of counsel.
Frederick A. Brown
for appellee;
Brown & Ewen and Katharine
Luby, of counsel.*

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

182 I.A. 54

This was a bill for dissolution of partnership and

for an accounting. In his answer to the bill, the defendant (plaintiff in error) denied the partnership and claimed that complainant was merely employed by him as his manager and salesman under an agreement that complainant should receive for his services one-half the net profits arising from the sale of automobiles. The cause was referred to a master, who heard the evidence and found that the agreement between the parties contemplated an equal division of profits and losses; that some business was done under the agreement, but disagreements soon arose, whereupon defendant took possession of all the partnership property, consisting of automobiles, automobile supplies, furniture, fixtures, etc., removed the same and refused to account to the complainant; and that the amount due to the complainant from the defendant is \$3780.43. Objections and exceptions were filed and overruled, and a decree was entered in accordance with the master's report. The defendant appeals.

It is urged that the objections to the master's report should have been sustained, because, it is said, the master did not itemize the amounts found to be due. There is no merit in the contention. The report states in itemized form, the substantial elements which entered into the computation of the amount found to be due by the master. This itemized statement leaves no doubt as to what was included in the total. We do not think it was necessary for the master to give the details of the

1995 = 100

© 2000 Blackwell Science Ltd *Journal of Internal Medicine* 247: 399–405

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... ..

THE UNIVERSITY OF CHICAGO

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...to him and my father, telling him all the same things

1. Green, J. H. (1998). *Journal of the American Academy of Child and Adolescent Psychiatry*, 37, 1000-1005.

—nature editor and medical director and staff about the same

-1966 and 1967 - several new officers to military camps in India

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1. *Phragmites australis* (Cav.) Trin. ex Steud.

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2. The Commission has also received information from the public that the Commission's decision to grant the license to the applicant was based on the applicant's financial resources and the applicant's ability to pay the license fee.

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Source: *Journal of the American Statistical Association*, 1974, 69, 1, 103-110.

Special Agent in Charge, Bureau, U. S. Dept. of Justice, Washington, D. C.

20. A large number of specimens were collected from the same locality.

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and to maintain the same level of service to the community.

Approved: _____

1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

When it was received by the writer to give the details of the

several items. The details are shown, however, in the exhibits attached to the master's report.

It is next urged that it was error to enter a decree against the defendant without first settling the partnership affairs. It appears that at the beginning of this suit an injunction was issued, restraining the defendant from collecting and disposing of the partnership assets. During the progress of the case, however, this injunction was dissolved upon the defendant's filing a bond to secure the payment of any amount which might be found due the complainant, and thereupon the defendant was left in possession of all the assets, and presumably has since collected the accounts and paid the bills of the partnership. At any rate, he did not claim or offer to show that such was not the fact; under such circumstances, it was not error for the court to find the amount due and owing to the complainant from the defendant on the basis of that presumption.

The remaining errors assigned may all be included in one, namely: that the master's report and the decree are contrary to the evidence. The complainant testified unequivocally that a partnership was formed, and produced a number of witnesses who testified that the defendant was introduced to them by the complainant as his partner. The defendant, on the other hand, denied that any partnership agreement was made, and testified that the arrangement between them was that the complainant should give his services and receive one-half the profits of the business, without being in any manner liable for the losses. The defendant did not deny, however, that he was held out to others as a partner, nor did he deny that he received from the complainant, after the agreement was made, cash and credits amounting to several thousand dollars, which were used in the business. After a care-

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ful review of the evidence, we are satisfied that the conclusions of the master and the chancellor were correct.

The decree of the Circuit Court will be affirmed.

AFFIRMED.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

October Term, 1911. No:

*Walter H. Ross, George Mackay
and Ray & Pease, for appellant.*

389 - 17926.

JOHN G. SKIPLE,
Appellant,

vs.

JOHNSON CHAIR COMPANY, a
corporation,
Appellee.

APPEAL FROM

CIRCUIT COURT, *Frank M. Cox and
R. J. Fellingham,*

COOK COUNTY. *for appellee.*

182 I.A. 66

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered upon a directed verdict for the defendant in a personal injury action. The plaintiff (appellant) is a carpenter and had been employed as such by the defendant (appellee) for many years. For several days prior to his injury, he, with other carpenters, was engaged in constructing four large doors intended to be used at the north and south ends of the defendant's dry-kiln, a brick building 54 feet wide and 150 feet in length. Each of the doors was nine feet wide, twelve feet high, and three inches thick, weighing about 1000 pounds. They were constructed in defendant's shipping room, 200 or 300 feet away from the dry-kiln. When they were ready to be hung, one Vinge, the carpenter in charge of the work, told the plaintiff and the others there at work to "come along and carry the doors from the shipping room". In response to this summons six or eight of the men, including Vinge and the plaintiff, lifted the doors and carried them to the dry-kiln. Two of the doors were thus carried to the south end of the building and the other two to the north end, where they were placed outside of the building, leaning against the brick wall. The ground around the building was uneven and strewn with the debris that usually surrounds a brick building in course of construction. In setting down the last of the

four doors, the workmen placed it in such a position that it projected three or four feet over, or in front of, the opening left for the doors in the north wall. A strong wind was blowing from the south, and as the plaintiff turned away to go after his tools, the door toppled over to the north, striking him on the head and back, and causing serious injuries.

The declaration has three counts. The first alleges that defendant neglected to use reasonable care to provide the plaintiff with a safe place to work, by permitting the ground to be "lilly and rough and covered with rubbish and debris", whereby the door "slipped, moved and fell" upon the plaintiff. There is no evidence whatever to the effect that the door fell because of this condition of the ground, nor is that a legitimate inference from the evidence. The only reasonable inference from the evidence is that the door was blown down by the wind, or that the workmen were careless in setting it down, or both.

The second count alleges that defendant negligently exposed the plaintiff to "extraordinary hazard" in permitting the door opening in the south wall of the dry kiln to remain open and without doors, whereby "the wind blew through said dry kiln from the south end to the north end and a strong draft was created" which "blew upon said door the plaintiff was working on and moved it and blew it over and it fell upon the plaintiff". There is evidence tending to support this allegation, but there is no averment in this count, nor is there any evidence in the record, that the plaintiff did not have full knowledge of all the facts regarding this alleged "unsafe condition of the premises", nor is there any averment or proof that he did not fully understand and appreciate the danger arising therefrom. Some proof of that sort was necessary to entitle the plaintiff to recover under the second

count. Montgomery Coal Co. v. Harringer, 218 Ill., 387;
Galloway v. C. R. I. & P. Ry. Co., 334 Ill., 474.

The third count, as amended upon the trial, alleges that defendant's foreman (1) negligently ordered the plaintiff "to place said door in a manner that was not reasonably safe, in that the foundation upon which said door was placed was rough and uneven"; and (2) negligently "failed to brace or support said door in order to hold it in position and prevent it from falling while the plaintiff was in the performance of his duty and work in said place"; and (3) that plaintiff was inexperienced in hanging such large doors, and that defendant "did not instruct or warn the plaintiff of the danger incident to the hanging of said door or precautionary method necessary to prevent said door from falling upon the plaintiff."

What we have said above as to the lack of evidence to sustain the first count applies with equal force to the first charge of negligence specified in this count. As to the second charge of negligence specified in this count, if it was necessary to brace or support the door to hold it in place after the plaintiff and the other workman had placed it against the wall in the manner above stated, that fact was manifestly quite as apparent to the plaintiff as it was to the foreman who was working with him at the time, and where that is true, the risk of injury is assumed by continuing at work without complaint. It is not the law in this State that an employee assumes only such risks as cannot be obviated by the adoption of precautionary measures by the master. "The true rule in this regard is, that the servant assumes not only the ordinary risks incident to his employment, but also all dangers which are obvious and apparent" (McCormick Machine Co. v. Zakzewski, 220 Ill., 522, 530); and while this rule is suspended (or its application denied) where a negligent,

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peremptory command is given by the master to do work which is attended with some danger of which the servant is not fully cognizant, and the servant relies upon the master's order as an assurance that he may safely perform the task (Republic Iron Co. v. Lee, 227 Ill., 246, 258), yet if the servant has full and complete knowledge of the danger, or if the danger is so apparent to any one of ordinary intelligence that the servant is not misled by the negligent order of the master, the general rule of assumed risk applies, and not the exception. C. & E. I. R. R. Co. v. Heerey, 203 Ill., 492; Republic Iron Co. v. Lee, *supra*; E. J. & E. Ry. Co. v. Myers, 226 Ill., 358; McGermick Machine Co. v. Zakowski, *supra*. In such cases, the employee "cannot assume a fact against his own knowledge, and assume that a defect open to his observation does not exist." Armour v. Brasseur, 191 Ill., 117. "If defects are obvious and open to the observation of every person of ordinary intelligence, and the evidence shows that the employee has had full opportunities for such observation, it is sufficient to charge him with knowledge." L. E. & W. R. R. Co. v. Wilson, 199 Ill., 89, 97. "If the danger is such that a person of ordinary intelligence would know what would naturally follow from the defective condition, and he has knowledge of the defective condition, knowledge of such condition carries knowledge of the danger and the risk is assumed." E. J. & E. R. R. Co. v. Myers, *supra*. Here the alleged unsafe or defective conditions under which the plaintiff was working and the danger arising therefrom were perfectly obvious to every person of ordinary intelligence, and the evidence shows, without controversy, that the plaintiff had full opportunity to see and to know such conditions and the attendant danger. With such knowledge, or opportunities for knowledge, he could not have been misled by the mere directions of the foreman to "help carry the doors from the

shipping room", and to place them against the brick wall. Nor did the plaintiff attempt to prove that he was not fully aware of such conditions and danger, or that he was in any manner misled by the order of the foreman. Without such proof the plaintiff failed to establish a prima facie case of liability under the second charge of the third count.

As to the last charge in that count, no recovery could be had on the facts shown, for the reason that there was no duty resting upon the defendant to warn the plaintiff of dangers which were obvious (C. & A. Ry. Co. v. Bell, 209 Ill., 25, 31), nor was the defendant required to instruct the plaintiff, an experienced carpenter, as to what "precautionary method", if any, was "necessary to prevent said door from falling upon the plaintiff".

We are of the opinion that the court did not err in giving the peremptory instruction, and the judgment will therefore be affirmed.

AFFIRMED.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation. Finally, the last step in the process is to evaluate the results of the implementation. This involves determining whether the problem has been solved and whether the resources have been used effectively.

1. The first step in the process of identifying a problem is to determine the nature of the problem. This involves a thorough understanding of the situation and the factors that are contributing to the problem. Once the nature of the problem is understood, the next step is to identify the causes of the problem. This involves a detailed analysis of the situation and the factors that are contributing to the problem. Once the causes of the problem are identified, the next step is to develop a plan of action. This involves determining the steps that need to be taken to solve the problem. Once a plan of action is developed, the next step is to implement the plan. This involves carrying out the steps that have been determined in the plan of action. Finally, the last step in the process is to evaluate the results of the plan. This involves determining whether the plan has been successful in solving the problem and whether any further action is needed.

It is not known if the patient was ever seen by a physician.

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Printed at Singapore Polytechnic, Singapore (1994), 421

THESE THINGS ARE TRUE, BUT THEY ARE NOT THE ONLY THINGS THAT ARE TRUE. THERE ARE MANY OTHER THINGS THAT ARE TRUE, AND THEY ARE ALL PART OF THE SAME WHOLE. THE WHOLE IS THE TRUTH, AND IT IS THE TRUTH THAT WE ARE TRYING TO REVEAL.

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Journal of Management Education

October Term, 1911. No:

409 - 17947.

CHARLES R. KAPPES,
Appellee,

vs.

AMERICAN LINSEED COMPANY, a)
corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

182 I.A. 68

Appellee, a real estate broker, sued appellant in the Municipal Court to recover commissions for selling certain real estate. He recovered a judgment of \$1,250, after a trial by jury. His story of the transaction was not denied by appellant, except in one particular, viz: a telephone conversation with appellant's manager confirming the authority of one Pfitsch to conduct negotiations on its behalf. This conversation was denied by the manager, who testified, however, that after learning from appellee that the latter had a prospective purchaser for appellant's real estate, and suspecting that the purchaser was a railroad company, he hired Pfitsch, a detective friend of his, to "find out who the customer was"; that Pfitsch "smoked them out" and "found the customer"; that he then "employed Pfitsch to negotiate the sale"; and that when he (the witness) signed the contract of sale to the purchaser thus "found", Pfitsch and appellee were both present. This was appellant's only witness, and upon this evidence, we do not see how a different verdict could well have been rendered. Upon this state of facts, the alleged error in refusing to strike out appellee's testimony as to a conversation with Pfitsch, which was admitted upon the promise of counsel to show Pfitsch's authority, was immaterial.

The verdict and judgment are so clearly right that we cannot avoid the conclusion that this appeal was prosecuted

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JOURNAL OF CLIMATE

88-1014

for delay. The judgment will therefore be affirmed, with statutory damages of one hundred dollars. The motion to tax the cost of additional abstract will be denied, however, as we think it was unnecessary.

AFFIRMED WITH DAMAGES.

- 2 -

The United States Government has been notified by the
 State Department that the United States has no objection
 to the United States Government's policy of not
 recognizing the Government of the People's Republic of China
 as the only legitimate government of China.

THE UNITED STATES GOVERNMENT

October Term, 1911. No.

446 - 17986.

WALTER MILLS,
Appellee,
vs.
EDWIN S. MASON,
Appellant.

(Filed)
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

182 I.A. 69

STATEMENT. On May 6, 1907, appellant, being then the owner of a ninety-nine year leasehold and six-story building on Monroe street, Chicago, executed his eleven promissory notes, aggregating \$10,000, payable to his own order and endorsed by him, and to secure the payment of the same, executed his trust deed, conveying to Gustav Wilke, as trustee, the leasehold and building, together with the boilers, engine, elevators, heating apparatus, and other machinery and fixtures therein. The first and second notes were for \$250 and \$750 respectively, due in one year, and the others were for \$1,000 each, due one in each year, after the first, for ten years. Appellee became the owner, by purchase, of all but the first note, which was owned by William L. Wallen. On March 17, 1908, appellee filed his verified bill in equity setting up his ownership of the notes, and alleging that for months appellant had allowed the building to remain vacant, that it was producing no income and was subject to a rent charge of \$6,000 a year and the taxes and assessments, that the machinery in the building was firmly attached to the same and a necessary part thereof, had cost \$8,000 and was worth not less than \$3,000, that appellant, with the assistance of The Power Equipment Company and The Merchants Transfer Company, was engaged in tearing out the machinery and equipment and removing the same, whereby the security for the payment of appellee's notes was being wasted, and that on that account,

appellee had elected to declare the whole amount of the indebtedness immediately due and payable. It was also alleged that the first note had been paid and that the property was scant security for the payment of complainant's notes. The bill prayed for an injunction, a receiver, an accounting and a sale of the mortgaged premises, if the amount found due should not be paid within a short day. After notice to the defendants, an injunction was issued restraining the defendants from removing any of the machinery or fixtures, until the further order of the court. A motion to dissolve the injunction was made and overruled. The defendants then answered the bill, admitting the allegations regarding the execution of the notes and trust deed, but denying appellee's ownership thereof, and that the first note had been paid, and denying that they "have torn out of said building any boilers, engines, or other machinery, apparatus and equipment of said building, except two Corliss engines and their connections which were not used," and which had been sold. The answer also denied that waste was being committed, and denied the right of appellee to declare the whole debt due. On April 27, 1908, appellant filed his cross-bill, averring that in September, 1907, Gustav Wilke, who then owned all but the first of the notes secured by the trust deed, offered to sell the same for \$4,700, which offer was accepted by appellant, who procured a certified check for that amount and offered to endorse it to Wilke; but that on Wilke's request, the matter went over to give him "an opportunity to secure the said notes and trust deed from his attorney", and later Wilke informed appellant that his attorney had sold the notes for \$6,000 to appellee. The cross bill charged that the sale by the attorney was not a bona fide sale, but was collusive and fraudulent and prayed that it be so decreed, and the notes be delivered to appellant on payment of \$4,700. A general and special

demurrer was sustained to this cross bill, and appellant filed an amended cross bill setting up the same alleged facts in more detail and offering to pay \$4,700 for said notes. A demurrer was sustained to the amended ^{CROSS} bill, which was there-upon dismissed for want of equity.

On June 5, 1908, appellee obtained leave to file and filed an "amended and supplemental bill," in which, after reciting the filing of the original bill and the subsequent proceedings, and a provision in the trust deed requiring ten days written notice of default to be mailed to appellant before the whole amount should be declared due and payable, it was alleged that the first two notes had become due on May 3, 1908, that the first had been paid but the second had not been paid, nor had any interest on appellee's notes been paid, that on May 11, 1908, appellee mailed a written notice of such default to appellant as provided by the trust deed, and on May 23, 1908, appellee declared the whole amount due and payable. The supplemental bill prayed for an accounting and decree for the payment of the whole amount of appellee's notes, and a sale of the property, unless the amount found due be paid within a time to be fixed by the court, and the defendants be foreclosed if the property sold be not redeemed according to law. To the supplemental bill, the defendants filed an answer admitting the service upon appellant of the notice of default, and neither admitting nor denying the other averments thereof. After the cross bill had been dismissed, however, the defendants obtained leave to file and filed an amendment to their answer, in which they inserted, almost verbatim, the same allegations of an alleged sale of the notes by Wilke to appellant for \$4,700, as were contained in the amended cross bill, and charged that the purchase of the notes from Wilke by appellee was not a bona fide sale.

The cause was referred to a master, who heard the evidence fully, and reported the same, with his findings thereon, and recommended the entry of a decree according to the prayer of the original and supplemental bills. Exceptions were filed to his report and overruled, and a decree was entered accordingly, from which the defendants prayed and were allowed an appeal "jointly and severally", on filing a bond of \$1,500. The defendant Mason alone filed such a bond.

Upon the filing of the transcript of the record in this court, a motion was made, the decision upon which was reserved to the hearing, to strike from the record the assignment of errors and dismiss the appeal, upon the grounds that the assignment of errors purports to be made by all the defendants instead of by Mason alone, and further that the record shows that Mason has parted with all his interest in the mortgaged property, and therefore has no interest in the result of this appeal.

The errors assigned are sufficiently stated in the opinion following this statement.

Kirkham Kraft, for appellant. By Arthur M. Lee, for appellee.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The motion to dismiss the appeal must be denied. It is true that Mason is the only defendant who has appealed, and therefore the other defendants cannot assign errors, as appellants, upon the record, nor can Mason assign errors in their behalf (Norris v. Downing, 126 Ill., 91), but the assignment of errors, purporting to be made by all, is made "jointly and severally". While such an assignment is unavailing as to those who have not appealed, it may nevertheless be properly treated as a separate assignment of errors by Mason alone. Norris v. Downing, *supra*; Green v. Straykowski, 124 Ill. App., 300. As to the point made that the record shows that Mason has sold the premises, and therefore has no

further right to continue the litigation, it appears that he parted with his interest pendente lite, and as his grantees were not made defendants in his stead, he continues as the only party representing their interest, and as such, he has a right to appeal. Moore v. Jenks, 173 Ill., 157.

It is urged that the original bill was insufficient because no notice of any default or breach of covenant was mailed to Mason, as required by the trust deed, before the suit was begun, and that the failure to give such notice ten days prior to the filing of the bill was not cured by giving such a notice later and then filing a supplemental bill setting up that fact. In Miller v. Cook, 135 Ill., 190, it is said (p. 205): "The rule, as we understand it, is well stated by Chancellor Walworth in Candler v. Petit, 1 Paige's Ch. 168, and is, in substance, that if an original bill is wholly defective, and there is no ground for proceeding under it, it can not be sustained by filing a supplemental bill, founded upon matters which have subsequently taken place; but that if the original bill is sufficient for one kind of relief, and facts afterwards occur which entitle the complainant to other and more extensive relief, he may have such relief by setting out the new matter in a supplemental bill." The original bill in this case set up facts which, if true, certainly entitled the complainant to at least one kind of relief, viz: an injunction to restrain waste. Williams v. Chicago Exhibition Co., 188 Ill., 19. The master found, from the evidence, that the removal of the Corlies engines and shafting constituted waste, and in view of the undisputed evidence as to the condition of the premises at the time of such removal, we think the master was justified in coming to that conclusion. But even if this evidence were not sufficient, in itself, to show that waste had already been committed, it was sufficient to show that an injunction to restrain further removals of the

[illegible]

same nature (and consequent undoubted waste) was necessary. The bill was not, therefore, "wholly insufficient", nor was the proof insufficient to sustain the bill as a bill to restrain waste; and being "sufficient for one kind of relief", it was also sufficient, under the rule above quoted, as a foundation for the supplemental bill which set up the additional subsequent fact of notice of default in the payment of interest and of the principal of one of the notes. The same considerations are also a sufficient answer to the further contention, that the original bill was insufficient because the owner of note number one was not made a party, though this point does not seem to have been made in the court below, and is therefore not properly before this court.

It is also contended that by the terms of the trust deed appellee, alone, did not have the right to declare the whole amount due and payable, but that the option to do so, given by the trust deed, must be exercised by all the holders of notes. It appears from the evidence that note number one, for \$250, was originally owned by the defendant Wallen, but after the supplemental bill was filed it was sold by him to a church association which held a second mortgage on the property. This second mortgage was apparently paid later by the owners of the equity of redemption, but whether note number one was delivered to such owners as a part of that transaction seems to be left in doubt by the evidence. The master found that this note was paid and surrendered, and as neither Wallen nor the church association objected or excepted to that finding, nor appealed from the decree, appellant is not in a position to question it. Aside from that fact, however, we do not think the language of the trust deed can fairly be construed as claimed by appellant's counsel. The option clause reads as follows: "If default be made in the payment of said promissory notes, or either or any of the same,*****or in case of waste,

*****then and in such case, the whole of said principal sum and interest secured by said promissory notes, shall thereupon, at the option of the legal holder or holders thereof, become immediately due and payable", etc. If this were the only clause in the trust deed or notes designating the persons who could exercise the option thus given, there might be some force in the contention of appellant's counsel. By another clause of the trust deed, however, it is provided that a written notice of any default shall be given to appellant, stating the particulars thereof, which notice shall be signed by the trustee, or his successor, or the owners of the notes, "or any or either of them", and shall be mailed to appellant "ten days prior to the time when*****the person or persons owning or holding said notes, or any one of the same, shall declare the indebtedness secured by this trust deed wholly due and payable as herein provided". By this clause, referring, as it does, directly to the option clause, the parties themselves have recognized the right of the holder of any one of the notes, as well as the right of all such holders, under the option clause of the trust deed, to "declare" the indebtedness secured thereby "wholly due and payable". In our opinion, the parties intended by this clause, to authorize the holder of any note which was not paid at maturity to give appellant notice of such default with the particulars thereof, and if the note were not paid within ten days thereafter, to declare the whole indebtedness at once due and payable.

It is also urged that the court erred in dismissing the appellant's cross-bill and in overruling his exceptions to the master's finding that no sale of notes numbered 3 to 11 inclusive had been made to appellant prior to the purchase of the same by appellee. The only purpose of the cross-bill was to establish the alleged sale of the notes to appellant,

and whether the court ruled correctly or otherwise in dismissing the cross-bill is immaterial, because the same facts alleged in the cross bill were afterwards set up in the answer of appellant, and a full hearing was given him upon the issue thus raised. If appellant was in fact the equitable owner of the notes, instead of appellee, that fact could be shown as a defense and without any cross-bill. The testimony as to what occurred at the time of the offer of \$4,700 and the alleged acceptance of such offer, was conflicting, and after reading the evidence, we are unable to say that the master's finding in that respect is not fully supported by the preponderance of the evidence. But if the facts were all as claimed by appellant, they would not amount to an accord and satisfaction, but would show nothing more than a mere verbal executory agreement, without any consideration whatever, to accept half of the face value of the notes from the maker thereof. We think there was no error in the rulings of the court upon these points.

The decree of the Superior Court will be affirmed.

AFFIRMED.

October Term, 1911, No.

480 - 18020.

ENIL SCHAEDEL,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

*Bynum, for appellee; Bernhardt
Frank, of counsel.*

*Joseph D. Ryan and Frank
L. Krite, for appellant; John E.
Guilliams, of counsel.*

*Edward M. Mator
and James E.*

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

1821A.70

Appellee recovered a judgment against appellant for damages for personal injuries sustained by him while crossing Lake street at the intersection of Leavitt street, Chicago, about seven o'clock in the evening of May 24, 1910. It is conceded by appellant's counsel that if appellant is liable for such injuries upon the facts shown, the amount of the recovery (\$1,500) is reasonable. It is also practically conceded that the evidence shows negligence on the part of appellant's motorman. It is insisted, however, that the evidence also shows that the plaintiff (appellee) was guilty of contributory negligence, and that the trial court erred in certain rulings during the examination of witnesses and in giving the third instruction on behalf of the plaintiff.

The declaration alleges, in substance, that the defendant negligently operated one of its street cars at such a "high, dangerous and unlawful" rate of speed, without ringing a bell or sounding a gong, as to run into the plaintiff at a public crossing and injure him seriously without any fault on his part.

Appellant operates a double-track electric street-car line on Lake street. Lake street is a business street, running east and west, and is eighty feet wide, with a roadway approximately forty-eight feet in width from curb to curb. There is an elevated railway in the same street. The columns supporting the elevated structure are located in the roadway,

adjoining the curbstones. The north rail of defendant's north track is sixteen feet south of the north curbstone, and the "gauge" of the tracks is four feet, eight and one-half inches. Leavitt street runs north and south, and is approximately sixty-six feet in width, with a roadway of thirty-eight feet. Hoyne avenue crosses Lake street about 800 feet east of Leavitt.

About seven o'clock on the evening mentioned, the plaintiff, whose place of business was on the north side of Lake street, east of Leavitt, left his shop to go home. It was twilight, but the street was well lighted by the lights from the shop windows and electric street lamps. He walked west on the north sidewalk on Lake street to the east sidewalk on Leavitt street and there turned south across Lake street. He testified that as he stepped down from the curbstone to the roadway and walked past a column of the "elevated" at that point, he looked to the east and saw a street car "coming up from Hoyne avenue" on the north track; that "it appeared to be near Hoyne Avenue"; that "when I seen the car was far enough down, I went across up to the north track"; that at that point, he looked again and saw the car about 100 feet away; that "then I stepped over the track, and before I got over the track, I looked again and saw the car was up to me and I quick stepped off the track". He was hit by the southwest corner of the car and thrown to the ground. The power was shut off and the brakes set when the plaintiff was hit, but the car went over 100 feet further before it stopped, at a point at least fifty feet beyond Leavitt street.

The motorman testified that he first saw the plaintiff when the latter was "a foot or a foot and a half" north of the north rail; that the car was then 100 or 150 feet east of the crossing and was "howling along pretty good" at a

"five-point" speed, or about ten or eleven miles an hour; that the plaintiff "glanced up and hesitated, then he started across"; that when the plaintiff reached the first rail, the car was 55 feet from him; that he was then walking at the rate of "from three to four miles an hour"; that the witness rang his bell and "hollered", but did not shut off the power, nor set the air-brake, until the car was about fifteen feet from the plaintiff. The motorman also testified that when his car was going at the rate of ten or eleven miles an hour, "it would take about 75 feet to stop".

Two witnesses, who were standing on the corner of Lake and Leavitt streets, corroborate the plaintiff in all essential particulars. One of them estimated the rate of speed the car was going at 30 miles an hour and the other at 35 miles an hour. Two passengers, who were standing near the motorman on the front platform, testified that they saw the plaintiff walking south on the crossing when the car was at least 100 feet from him and one of them said that the motorman was talking to a friend on the platform and did nothing to check the speed of the car until just before the collision occurred. All these witnesses testified that they heard no bell or gong. On the other hand, two other passengers, who were also on the front platform, testified that their attention was called to the plaintiff's position by the sudden ringing of the gong and the shout of the motorman. One of these witnesses said that the plaintiff was then 25 feet in front of the car, and the other said he was forty feet away. Both of these witnesses testified that at that time the plaintiff was walking slowly southwest in the center of the street intersection, with his head down. The motorman, also, testified, on his direct examination, that the plaintiff was walking "on a slant", southwest, near the center of the crossing, but on cross-examination he said that the plaintiff was

[illegible]

walking about ten feet west of the east side of Leavitt street - which would be within the lines of the east sidewalk on Leavitt street, if such lines were produced across Lake street. When the plaintiff was picked up, he was lying on the south track, near (probably east of) the center line of Leavitt street.

The evidence also shows, without contradiction, that the street car which hit the plaintiff was seven feet and six inches wide "over all". The gauge of the track being four feet, eight and one-half inches, the "overhang" of the car to the north and south of the track was therefore one foot, four and three-quarters inches, and the distance in a direct line from a point a foot and a half north of the north rail to the south edge of a car standing on the north track, would be seven feet, seven and one-fourth inches. The clear preponderance of the evidence is to the effect that while the plaintiff, walking at the rate of three or four miles an hour, was crossing this space of less than eight feet, the street car went a distance of at least one hundred feet. At three miles an hour, a man walks 4.4 feet per second, or eight feet in less than two seconds. A car moving 100 feet in two seconds is traveling at the rate of 34 miles an hour. Even if the plaintiff walked due south-west "on a slant", the distance covered by him would not be over twelve feet, and on that assumption, if he walked at the rate of three miles an hour, the car must have been moving at the rate of over twenty-two miles an hour. From these simple computations, which any intelligent juror could make, it is manifest that the motorman's estimate of the rate of speed at which he was traveling is altogether too low, and is wholly inconsistent with the rest of his testimony. With this exception, his evidence corroborates that of the plaintiff in most respects, and leaves little room to doubt that the negligent, not to say reckless, operation of the street car was an efficient

cause of the accident, if not the sole cause.

There is no count in the declaration, however, which charges any wanton or willful misconduct or intentional neglect of duty on the part of the defendant's servants. Hence, the question of the contributory negligence of the plaintiff still remains. C. W. & V. Coal Co. v. Moran, 210 Ill., 9.

In Chicago City Ry. Co. v. Sandusky, 198 Ill., 400, a cable car collided at a street crossing with a junk wagon in which the plaintiff was riding, and it appeared from the evidence that before ^{he} attempted to drive across the tracks, he "looked down the street to the south and saw the car which was approaching the crossing from that direction". He testified that the car was then, as he thought, a distance of about one-half block from the crossing. It was contended that upon this evidence it must be held, as a matter of law, that the plaintiff was guilty of a failure to observe ordinary care for his own safety. As to this contention, the court said: "Attempting to cross the track of a street railway ahead of a moving car is not necessarily to be imputed as contributory negligence, It may or may not be prudent, depending upon the proximity of the car and the speed with which it is moving. Whether, in the particular instance, reasonable care was exercised in going upon the track is usually a question for the jury, under proper instructions.****The evidence in the present case was not such as to justify the court in declaring as a matter of law, the appellee did not act with reasonable care for his own safety."

The same conclusion was reached in Chicago Union Traction Co. v. Jacobson, 217 Ill., 404, where the driver of a heavy truck, loaded with flour, turned his team across the street car tracks in the middle of a block ahead of an approaching electric car and a collision followed. There the

... ..

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...and the

and is available for collection up to 10 days after death.

Journal of the American Statistical Association, 93(463), 1019-1029.

• • • • •

10. The following table shows the number of people who attended the concert in each age group.

more and more, the value of the dollar is falling and the value of the dollar is falling.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

...which will serve as a basis of reference for the future.

"locked down the other 90 and the hotel."

[illegible]

— 100 —

Along with the other members of the group, we will be working on a variety of projects that will help us to understand the world around us and to make a positive impact on our community.

...and to retain a few, like me, to whom it is essential to

[illegible][illegible]

• To learn whether there is a link between the use of

APPENDIX 2: A list of all 1997-1998 and 1998-1999

[illegible]

...given it is likely that people will not be able to identify the

—1987 and 1988, respectively, and 1987 and 1988, respectively.

There is a lot of talk about the need for a new approach to the management of the environment. The idea is to move away from the traditional approach of treating the environment as a resource to be exploited, and towards a more holistic approach that takes account of the needs of the community as a whole. This is a very important issue, and it is one that we must all be aware of. The environment is a precious resource, and it is our responsibility to ensure that it is protected for future generations. We must all do our part to ensure that the environment is managed in a sustainable way, and that the needs of the community are taken into account. This is a challenge, but it is one that we must all face. We must all work together to ensure that the environment is protected for future generations, and that the needs of the community are taken into account. This is a challenge, but it is one that we must all face.

Approved: _____ Date: _____

[illegible]

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

[illegible]

THE UNITED STATES OF AMERICA

[illegible]

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED, DATE 11-19-2001 BY 60322 UCBAW

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... ..

court said (p. 407): "He (the driver) said that he knew the car would have to stop or slow down or it would probably strike his wagon, and that the car could slack up just as well as he could with a team, and he thought the motorman could stop the car when the car was right close to the wagon. That testimony would justify the conclusion that appellee knew, when he drove upon the track, that a collision would be inevitable in the ordinary operation of the car, unless the motorman of appellant should prevent the collision by his care and diligence. But appellee also testified that when he turned his team to cross the track the car was about one hundred feet east of Whipple street, that said street was about two hundred feet east of him, and that he thought he had time to get across the track. He was bound to exercise a reasonable judgment in view of all the circumstances, and the court, in passing on the motion, was required to consider all the evidence, including the distance of the car from the wagon, the rate of speed and all the circumstances. We cannot say that in so considering it, the evidence necessarily led to but one conclusion, but we think that the question whether, under all the circumstances, appellee believed, upon reasonable grounds, that he had time to get across the track before the car would reach him, was proper to be submitted to the jury." (Italics ours.)

We think the facts of this case bring it within the reasoning and conclusion of the cases above cited. It cannot be held, as a matter of law, that the plaintiff was necessarily guilty of a want of due care merely because he attempted to cross the defendant's tracks with knowledge that a car was approaching rapidly. Whether it was prudent for him to do so depends upon the distance he had to go, the apparent proximity of the car, the apparent speed with which it was moving at the time and other like circumstances. In deciding to make the attempt, he was bound only to exercise a reasonable judgment,

232

[illegible]

in view of all the circumstances; and if, as he testified, he believed he had ample time to cross the tracks ahead of the car in safety, it was a question of fact for the jury whether, under the circumstances shown, he had reasonable grounds for that belief. The jury having found in his favor on that question, and its finding having been approved by the trial judge, we are not authorized to set aside the verdict and reverse the judgment, unless we are prepared to say, after a due examination of the evidence, that the verdict is clearly contrary to the weight of the evidence. This we are unable to do. When the plaintiff first saw the car coming, it appeared to be nearly a block away. He had less than twenty feet to go in order to cross the track. The car seemed to be "far enough down", so he went on. Just before he stepped on the track he looked again. The car was 100 feet away. He hesitated, but concluded there was time to cross in safety. We can see nothing unreasonable in that conclusion. While he could see that the car was coming along very fast, it would be unreasonable, in our opinion, to expect him to deduce from that fact, at his peril, that the car was moving at the unusual speed of 100 feet in two seconds, and that the motorman would make no effort whatever to check this most extraordinary speed in approaching a public crossing in a business street. While it is undoubtedly true that the plaintiff had no right to rely solely upon the presumption that the motorman would perform his legal duty to exercise due care in the operation of his street car at such a time and place, yet that presumption exists as a matter of law and is entitled to due weight in determining the question of contributory negligence. "Anticipation of negligence in others is not a duty which the law imposes." Schlauer v. Chicago & So. Traction Co., 253 Ill., 154, 159. The reasoning of the court in Chicago City Ry. Co. v. Otis, 192 Ill., 514, and in Chicago General Ry. Co.

v. Carroll, 91 Ill. App., 388,^{as} applied to somewhat similar facts, is also applicable to the facts of this case.

We do not think the court erred in refusing to permit defendant's counsel, on cross-examination of the witness who had given his opinion that the car was going at the rate of 35 miles an hour, to ask such questions as: "You think it not unusual for cars to run 35 or 40 miles on Lake street in Chicago?" and "What is your opinion as to the speed of cars on other streets?" The witness was not testifying as an expert, and even if he were, the sarcastic and belligerent tone of the questions justified the ruling of the court. Nor was it error to permit the plaintiff to testify that he heard no gong or bell. While perhaps the failure of the motorman to ring a bell as a warning to the plaintiff might not be an independent ground for recovery, yet the fact that plaintiff heard no bell rung had a bearing upon the question whether the plaintiff was exercising due care for his own safety. As to the conversation between the motorman and one of the passengers some time before the accident, we do not attach any serious importance to the alleged error, if any there was. The fact that the car was going very fast being clearly shown, it could make no difference whether the motorman said he "would hustle up" to keep an appointment, or not.

The plaintiff's third instruction defines the words "ordinary care" to mean "that degree of care which a reasonably prudent or cautious person would take to avoid injury under like circumstances". It is objected that this construction assumes that a reasonably prudent person might find himself in the position the plaintiff was in at the time of the injury, and the case of N. C. & R. R. Co. v. Coe, 203 Ill., 608, is cited in support of this view. The instruction in question in that case, however, was not the same as the one given

General, of Ill. 47, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

in this case. There the words "under like circumstances" were followed by the phrase "and in the same situation", thereby limiting the question of due care to the conduct of the plaintiff at the time of the injury, "regardless of his conduct in placing himself in a place of danger". With the latter phrase omitted, the words "under like circumstances" are not limited to the precise moment of the collision, but embrace all the circumstances relating to the accident. But if it were open to the objection stated, the Defendant is not in a position to complain, for several of its own instructions limit the question of due care to the conduct of the plaintiff "at the time and place in question". See Commonwealth Electric Co. v. Rose, 214 Ill., 545; United Breweries Co. v. O'Donnell, 221 Ill., 334.

Finding no reversible error among those discussed in the briefs of counsel, the judgment will be affirmed.

AFFIRMED.

Mr. Presiding Justice McSurely dissents.

March Term, 1912, 1913.

282 - 18322. -

*George U. Neeves, Jr. and
K. Neeves, for plaintiff in error.*

FRED C. RICHMIRE,
Defendant in Error,

) ERROR TO

vs.

) MUNICIPAL COURT

GEORGE A. NEEVES,
Plaintiff in Error.

) OF CHICAGO.

*Charles S. McNeth, for
defendant in error.*

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

182 I.A. 77

Defendant in error recovered a judgment against plaintiff in error for \$400, in an action of the fourth class, brought in the Municipal Court of Chicago. The plaintiff's statement of claim is for money due upon three promissory notes signed by plaintiff in error. The first two of such notes are dated "Chicago, October 19, 1910", are payable to the order of McCarty & Russell, at 143 Dearborn Street, Chicago, Illinois, and are endorsed by them in blank. The third note is dated "Morocco, Ind., May 7, 1910", is payable to the order of plaintiff in error at the First National Bank in Chicago, and is endorsed by plaintiff in error in blank. The summons issued by the Municipal Court commands the bailiff of that court to summon the defendant "if he shall be found in the first district of the city of Chicago to appear before the Municipal Court", etc., and the return of the bailiff shows personal service by delivering a copy to the defendant, "with a praecipe and statement of claim and affidavit attached thereto, and at the same time informing him of the contents thereof in the city of Chicago". The defendant entered a general appearance and demand for a jury trial, and filed an affidavit of merits, which, as amended, states that his defense is that all the notes were executed without consideration, that the first two notes were assigned to the plaintiff after the maturity thereof, and that the third note was executed and delivered to the plaintiff by the defendant. When the case was

reached for trial, the defendant made a motion for a continuance, and in support of his motion, filed two affidavits. The first was signed by a physician, who deposed that about two months prior to the trial, he had performed a surgical operation upon the defendant, "that said Neeves is not able to appear in court because of the said physical condition of said Neeves", and that "he verily believes the said Neeves will not be able to appear in court for the trial of this suit for at least thirty days hereafter". The second affidavit is by the attorney of the defendant, who states that defendant "has been seriously ill for some length of time", that two months before the trial he had a surgical operation, and that the affiant was informed by the surgeon that defendant would be fully recovered and able to be about in three or four weeks after the operation, but that complications ensued, which "delayed and prevented the full and early recovery of said defendant", that defendant "will be ready and willing to proceed with the trial of said suit as soon as his physical condition will permit, and affiant says that he fully expects said defendant will be able to appear in court and proceed with the trial in not to exceed thirty days"; that the presence of the defendant is necessary because he is a material witness in his own behalf; that he expects to show by the defendant that the third note was executed and delivered "solely for the release and satisfaction" of sundry unfounded claims for mechanic's liens, which, affiant states, were clouds upon the title to defendant's property; that the presence of defendant is also necessary for the purpose of aiding in the examination and cross-examination of witnesses and to explain certain letters and conversations which the affiant says the plaintiff will introduce; and that "because of his physical condition, defendant is unable to appear in court". The record then shows that "the court,

[illegible]

upon consideration of said motion and upon the fact that this cause has been upon the trial call on February 13, 14, 15, 16, 19 and 20th, and called for trial several times during this time and postponed upon the motion of the defendant, whose counsel promised that he would obtain the deposition of the defendant, * * * and on the further ground that the cause had been expressly continued from February 20th to February 23rd on motion of deft., who stated by counsel that he would be ready for trial on the 23rd", denied the motion for a continuance. No letters from, or conversations with, the defendant, were introduced.

It is first urged that the court erred in denying the motion for a continuance. In support of this contention counsel cite the case of Schnell v. Rothbath, 71 Ill. 83. The only point decided in that case was that the court properly denied a motion for continuance, on facts similar to the case before us. It was there held that affidavits which do not show that the presence of a defendant at the trial is necessary and which do not state that the defendant is sick at the time of the application for continuance, are insufficient. The same is true in this case. The statements in the affidavits that the defendant was "unable to attend the trial" are the mere conclusions of the deponents. Neither of the affidavits shows any necessity for the presence of the defendant at the trial. The matters which it is said the defendant, if present, would testify to, would not be material, if true. We are of the opinion that there was no error in denying the motion for a continuance.

It is next urged that the Municipal Court of Chicago is a local inferior court, that no presumptions are to be indulged in favor of its jurisdiction and that the record does not show that the Municipal Court had jurisdiction. We think the contention is without merit. Jurisdiction is the power to hear and determine

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the various groups and individuals mentioned in the report. It is therefore necessary to state that the Commission is not in a position to make any further statements at this time.

IT is filed upon the record as being the
original of a document. It appears on this portion of the
file the name of John W. Smith, Jr. The only name
appearing in this case was that the name properly should be a name
for business, or name stated in the name before me. It was
shown that the affidavit was not true that the person
is a resident of the town in question and that he was placed
that the affidavit is not at the time of the application for the
license, and that the name is not in this case. The
affidavit is not the affidavit that the person was "residing in
the town" and the name was not in the affidavit. The
fact of the affidavit shows any necessary for the person to
the affidavit of the name. The name is not in the affidavit
because, in person, would testify to, would not be satisfied, it
would be one of the affidavits that were not in the

in almost every, particularly in the present so dark and gloomy
that the spiritual world has disappeared. We have the spiritual
in regard of the individual and that the present dark and gloomy
in a great measure, that the spiritual world has disappeared and the
it is very good that the spiritual world has disappeared.

The world for a moment.

a cause. Section 2 of the Municipal Court Act gives the Municipal Court jurisdiction, as cases of the fourth class, of "all civil actions, quasi criminal actions excepted, for the recovery of money only, when the amount claimed by the plaintiff, exclusive of costs, does not exceed One Thousand Dollars". Section 4 of the Act divides the city of Chicago into five districts, the first of which embraces the central business portion of the city. Section 29 provides that cases of the fourth class, mentioned in section 2 of the Act, shall be brought and prosecuted in the district in which the defendant resides or is found. The bailiff's return shows that the defendant was found in the first district of Chicago. He entered a general appearance and filed an affidavit of merits, in neither of which did he object to the jurisdiction of the court. Jurisdiction of the subject matter is expressly conferred by statute, and jurisdiction of the person cannot be denied after a general appearance has been entered and a plea to the merits has been filed. An affidavit of merits in the Municipal Court answers the same purpose in this respect, as a plea to the merits in the Circuit Court. Furthermore, as all the notes sued upon were expressly made payable in the city of Chicago, the cause of action arose or accrued within that city, and that fact appears of record.

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

March Term,
301 - 18341.

F. W. NORWOOD and Q. Y. HAMILTON,
doing business under firm name of
LUMBER SHIPPERS STORAGE & COMMIS-
SION CO.,

Defendants in Error,

vs.

MAREMONT, WOLFSON & COHEN COMPANY,
a Corporation,

Plaintiff in Error.

Edward H. Litzinger, for
plaintiff in error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Fred H. Atwood, Frank
B. Pease and Charles
C. Locks, for defendants
in error; Burrell J. Cramer, for

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

182 I.A. 78

Defendants in error are in the lumber business, and plaintiff in error is a wagon manufacturer. One Jox, a lumber broker, told Hamilton that plaintiff in error "wanted two wagon loads of first and second hickory". Hamilton understood this as an order from plaintiff in error, and sent two wagon loads to the place of business of plaintiff in error, with tickets purporting to show that the wagons contained a total of 4653 feet of "first and second hickory". As the wagons were unloaded one of the men in the yard of plaintiff in error "tallied" and graded the lumber and noted on the back of the tickets that there had been "received in good order" 1172 feet of "first and second hickory" and 2525 feet of "common", an inferior grade of lumber. Three days later Hamilton wrote to the plaintiff in error as follows: "We enclose you invoice for two wagon loads of hickory, shipped to you on order from Mr. Jox. * * * This lumber was billed to your firm on our tickets and was subject to your acceptance or refusal. * * * We would be pleased to have you report on these two loads as early as possible, and if satisfactory, we will adjust the matter with you direct. Mr. Jox was merely selling on a commission". The invoice which was enclosed with this letter was for 4653 feet of "1 & 2 Hickory @ \$55, \$255.92". Plaintiff in error replied to this letter as follows:

THE UNITED STATES OF AMERICA
DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK
IN SENATE
JANUARY 10, 1900
REPORT OF THE COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
MAY 1, 1899
AND
A REPORT OF THE COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
MAY 1, 1899

87-A-1281

Defendants in error and in the further proceedings, and
plaintiff in error is a woman named Mary. She was a former
property, sold Hamilton that plaintiff in error "saw her two wagon
loads of first and second quality". Hamilton's receipt of this
as an order from plaintiff in error, and sent the wagon loads
to the place of business of plaintiff in error, who shipped
thereafter to show that the wagon contained a load of such
first of "first and second quality". As the wagon was delivered
out of the men in the yard of plaintiff in error "called" and
ordered the lumber and noted on the back of the tickets that
there had been "received in good order" first foot of "first and
second quality" and also foot of "common", an imitation grade of
lumber. Three days later Hamilton wrote to the plaintiff in
error as follows: "We enclose you invoice for two wagon loads
of Hickory, shipped to you on order from Mr. J. J. This
number was billed to your firm on our tickets and was subject to
your acceptance or refusal. We would be pleased to have
you return on these two loads as early as possible, and if satis-
fied, we will adjust the matter with you direct. Mr. J. J. was
usually selling on a commission". The invoice which was enclosed
also this letter was for 4000 feet of "1st and Hickory @ \$25,
1000, 00". Plaintiff in error replied to this letter as follows:

"We never bought two wagon loads of hickory from you, although we made a similar purchase from Mr. Jox. * * * We cannot pay for this lumber both to you and to Mr. Jox. * * * Moreover, * * * our tally is altogether different from yours, and even if you were entitled to payment for this lumber, your tally^{and} price is incorrect and does not agree with written order for this lumber given Mr. Jox. * * * We shall be pleased to pay you for this lumber in accordance with our order and tally sheet provided you will give us a written order from Mr. Jox to that effect". In response to this letter defendants in error offered to accept \$195 in full "to avoid any trouble or litigation", and saying further, "if this is satisfactory mail us your check. If not, we will call on you for our lumber". To this offer plaintiff in error replied that "the total amount of our purchase from Mr. Jox is only \$134.25, as the common was bought at \$30 and the 1st & 2ds at \$50. Our tally made up by Mr. Jox and our tally man shows 1170 ft. 1st & 2ds and 2525 ft. common. We suggest that you obtain legal right to amount due Mr. Jox from us". Hamilton testified that he then demanded a return of the lumber, but that plaintiff in error refused to return it, claiming it could not be identified. This suit followed. On a trial before a jury a verdict was rendered for defendants in error for \$278.81, and from a judgment entered thereon, plaintiff in error has sued out this writ of error.

It is undoubtedly the law, as contended by counsel for defendants in error, that one who accepts goods that have been ordered and appropriates them to his own use, cannot defeat an action for the purchase price merely on the ground that the goods are not of the exact quality or description ordered, since his remedy in such case, in the absence of a warranty, is either to refuse to accept the goods when delivered or to return them within

"We were issued two wagon loads of history from you, although
we have a similar purchase from Mr. Jan. & Co. in current day
for this number both to you and to Mr. Jan. & Co. Moreover, & &
your bill is altogether different from yours, and even if you
were entitled to payment for this number, your bill price is
different and does not agree with written order for this number
given Mr. Jan. & Co. We shall be pleased to pay you for this
number in accordance with our order and bill about provided
you will give us a written order from Mr. Jan. & Co. that amount."
In response to this letter defendant in error offered to accept
this bill "to avoid any trouble or litigation", and saying "un-
less, "if this is satisfactory call us your order. It may be
will call on you for our number". To this offer plaintiff in
error replied that "the total amount of our purchase from Mr.
Jan. & Co. was \$184.25, as the amount was being paid to him and the Jan.
& Co. of \$100. Our bill made up by Mr. Jan. & Co. and our bill was
made for \$184.25, as the amount was being paid to him and the Jan.
and Co. of \$100. We have no bill to amount one Mr. Jan. & Co. Hamilton
admitted that he had received a return of the number, but that
defendant in error refused to return it, claiming it would not
be returned. This was believed. On a trial before a jury a
verdict was rendered for defendant in error for \$184.25, and there
a judgment entered thereon. Plaintiff in error has moved for this
order of error.

It is immediately the law, as contended by counsel for
defendant in error, that one who accepts goods that have been
ordered and inspected them in his own way, cannot later on
return for the purchase price merely on the ground that the goods
are not of the exact quality or description ordered, since this
would be such case, in the absence of a warranty, is either to
return or accept the goods when delivered or to return them within

a reasonable time. American Theatre Co. v. Siegel, 221 Ill.

145. This rule applies when goods of a specified quality or description have been ordered. In this case the quality or description of the goods ordered was "first and second hickory". If plaintiff in error did not receive first and second hickory it was not bound to accept the lumber delivered, but was required to return the same within a reasonable time. Having received, however, and appropriated to its own use the two loads of hickory, it thereby waived all right to assert that the lumber delivered was not of the exact quality or description ordered. But this, we think, is the extent to which the rule above stated can be applied to the facts of this case. It cannot be applied so as to bind the plaintiff in error either as to quantity or as to price. It is clear from the evidence that the only specification of quantity was "two wagon loads", and it is also clear from the evidence that there was no agreement in advance as to the price. It is true that two wagon loads were delivered, but there is no evidence that the quantity invoiced was ever delivered to plaintiff in error. The burden was on the defendants in error to show, by a preponderance of the evidence, both that the quantity of lumber shown in the invoice was in fact delivered to the plaintiff in error, and also to show that the price charged was the market value of the lumber so delivered. In our opinion, defendants in error did not sustain this burden of proof. Proof that the quantity invoiced was loaded into wagons at the yard of defendants in error cannot preponderate over the positive and apparently credible evidence of those who measured the lumber as it was taken from the wagons in the yard of plaintiff in error, and there was no evidence whatever tending to prove either that the plaintiff in error agreed to pay for the lumber at the rate of \$55 per thousand feet, or that such was the market value of

...the same within a reasonable time. Having previously, how-
ever, and appropriated to its own use the two loads of history,
it claims waived all right to account that the lumber delivered
was not of the exact quality or description ordered. But this, we
think, is the extent to which the rule above stated can be applied
to the facts of this case. It cannot be applied so as to bind the
plaintiff in error either as to quantity or as to price. It is
clear from the evidence that the only specification of quantity
was "two wagon loads", and it is also clear from the evidence that
there was no agreement in advance as to the price. It is true
that the wagon loads were delivered, but there is no evidence that
the quantity involved was ever delivered to plaintiff in error.
The burden was on the defendant in error to show, by a pre-
ponderance of the evidence, both that the quantity of lumber
shown in the invoice was in fact delivered to the plaintiff in
error, and also to show that the price charged was the market
value of the lumber so delivered. In our opinion, defendant
in error did not sustain this burden of proof. First, that the
quantity involved was loaded into wagons at the yard of defend-
ant in error cannot preponderate over the positive and appen-
dix credible evidence of those who measured the lumber as it
was taken from the wagons in the yard of plaintiff in error,
and there was no evidence whatever tending to prove either that
the plaintiff in error agreed to pay for the lumber at the rate
of \$25 per thousand feet, or that such was the market value of

the lumber delivered. For these reasons, we think the error in overruling the motion for a new trial.

It was admitted, however, by the plaintiff in error, that it gave an order to Jox for the purchase of two wagon loads of first and second hickory at \$50 per thousand feet, and that it actually received 3697 feet of hickory. Applying the rule above stated as to quality, it is clear that upon the admissions of plaintiff in error the defendants in error were entitled to be paid for at least 3697 feet at \$50 per thousand feet, or \$184.85. As these figures appear from the record, the error of the trial court in refusing to grant a new trial can be cured by a remittitur, if defendants in error choose to cure it in that way.

If, therefore, defendants in error, within ten days, shall file herein a remittitur of \$93.96, the judgment for the remainder, viz: \$184.85, will be affirmed; otherwise, the judgment will be reversed and the cause remanded for a new trial.

AFFIRMED ON REMITTITUR.

the present defendant. For these reasons, we think the
error in excluding the evidence was a reversible error.
It was objected, however, by the plaintiff in error,
that it came in error to the fact the purchase of two
loads of tires and second history of the defendant's car,
that it actually received only two of history. Applying the
rule above stated as to quality, it is clear that when the
evidence of plaintiff is given the defendant in error was en-
titled to be paid for at least two tires at the defendant's
rate, or \$104.00. As these figures appear from the record,
the error of the trial court in refusing to grant a new trial
was corrected by a remittitur, it being found in error because it
was in that way.

It, therefore, defendant in error, within ten days,
shall file herein a remittitur of \$104.00, the balance of the
remittitur, \$104.00, will be returned; otherwise, the
judgment will be reversed and the case remanded for a new
trial.

REVEREND OF REVEREND

March Term, 1912, No.
520 - 18360.

DUQUESNE SECURITY COMPANY,
Ltd.,

Defendants in Error,

vs.

ISAAC W. HODGENS,
Plaintiff in Error.

*W Daniel Byrnes, for plaintiff
in error; John T. Byrnes,
counsel.*

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

*Clark & Clark, for defendant
in error.*

182 I.A. 38

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

A judgment by confession was rendered in the Municipal Court in 1910 against plaintiff in error for \$335, in favor of John Mulholland, upon two judgment notes, dated in 1903, due one day after date and payable to the order of John Mulholland, with interest. These notes were never indorsed. On motion of plaintiff in error the judgment was opened and leave given to make defense, the judgment to stand as security. Plaintiff in error filed an affidavit of merits setting up that he had paid the notes in full in August, 1903, to the manager of Mulholland, who had promised to mail him the cancelled notes but failed to do so. The affidavit of merits further states on information and belief that after the payment of the notes Mulholland went into bankruptcy and a trustee was elected, and "affiant charges that the said notes are not now the property of the plaintiff herein". Thereupon, on motion of the plaintiff, leave was granted to amend all records, papers and proceedings by changing the name of the plaintiff (Mulholland) to "J. F. McHenry, J. R. Jackson and James E. Taylor, associated together in a limited co-partnership, and doing business under the firm name of Duquesne Security Co., Ltd." Apparently all parties treated this order granting leave to amend as an amendment in fact, and no new or amended statement of claim or affidavit of merits was filed, but all orders entered thereafter are entitled in the name of the new plaintiffs as above stated. A jury trial was had, resulting in a verdict against the

plaintiffs, which was set aside and a new trial granted. On the second trial before a jury a verdict was returned against the defendant and assessing the plaintiffs' damages at \$282. Judgment was entered upon this verdict and this writ of error was sued out to reverse that judgment.

Upon the trial, apparently to meet the defense of want of title in the plaintiffs, the plaintiffs introduced (1) the deposition of a witness who testified that in 1906 Mulholland did business under the name of "F. W. Griffin, prime trustee for International Finance & Development Co.", and that the plaintiffs then purchased all the assets of Mulholland from said Griffin for \$500, among which assets were the two notes in question; (2) a bill of sale from said "F. W. Griffin, prime trustee", etc., to the Duquesne Security Co. Ltd. of "all negotiable instruments, papers and accounts now on the books of first party hereto"; and (3) the deposition of a witness who testified that these notes were "on the books" of Griffin, trustee, at the time of such purchase. All this evidence was admitted over the objections of the defendant, and at the close of plaintiffs' evidence, defendant's counsel moved to instruct the jury to find the issues for the defendant on the ground that no proof of title in the plaintiffs had been shown. This motion was renewed at the close of all the evidence. Both motions were overruled, and it is now contended that the court erred in refusing to instruct the jury to find for the defendant, as thus requested.

Under section 62 of the Practice Act, (which has been adopted by Rule 23 of the Municipal Court as a rule of practice in that court) the burden of proof to show a valid assignment of the notes was upon the plaintiffs, in view of the fact that the defendant, by his affidavit of merits, had denied under oath the title of the plaintiffs to the notes in question. The law is well settled that, under the statute in force at the time these transac-

[illegible][illegible][illegible]

tions took place, a promissory note could not be assigned so as to vest the legal title in the assignee by a separate instrument, but that it could only be done by indorsement on the note itself. Packer v. Roberts, 140 Ill. 871; Jacques v. Ballard, 111 Ill. App.

587. Treating the order granting leave to amend as an amendment in fact of the original narr. upon which judgment by confession was entered, there is no averment in the narr. as thus amended that the notes were assigned to the plaintiffs, and if there had been an averment that they were so assigned by a separate instrument, as the proof showed, the declaration would not have shown any right of action in the plaintiffs. Keeler v. Campbell, 24 Ill.

267. The practice followed in this case was so very loose that it calls for a repetition of the language of the Supreme Court in Walter Cabinet Co. v. Russell, 250 Ill. 418, at page 420, viz:

"The object of the rules requiring statements of claim and of set-off is to inform the parties of the nature of the respective claims, and while the formalities of pleading have been abolished by statute, it is still the law in the Municipal Court, as in other courts, that a party is limited in his evidence to the claim he has made; that he cannot make one claim in his statement and recover upon proof of another without amendment".

It is, however, insisted by counsel for defendant in error that, at the beginning of the trial, plaintiffs' counsel stated to the jury that the only issue made by the affidavit of merits was payment, and that defendant's counsel, in the presence of the jury, acquiesced in that statement. It may be that if counsel for the plaintiffs had relied upon this admission of counsel for defendant as a waiver of all defense save payment, and had rested the plaintiffs' case upon the prima facie evidence of the notes, the defendant would not now be in a position to assign any error based upon a failure of the plaintiffs to prove title to

the notes. But counsel for the plaintiffs did not see fit to accept and act upon that admission or statement of opposing counsel. Instead of relying upon that statement, they undertook to prove the title of the plaintiffs, and failed. When the offered evidence of title was objected to, and when counsel for the defendant made their motion to instruct the jury to find for the defendant upon the ground that no title in the plaintiffs had been proved, this was sufficient notice to plaintiffs' counsel, upon the trial, that the want of title to the notes, as well as payment, would be relied on as a defense. Under these circumstances, we do not think the plaintiffs can well claim that they were deceived or misled by the oral statements of defendant's counsel into a belief that the defense of want of title was waived.

Other errors are assigned and discussed, but as these will probably be obviated upon a new trial, it will be unnecessary to decide them. We think the court erred in refusing to give the peremptory instruction, and for that error the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

March Term, 1912, No.
542 - 18,380.

Royal H. Swin and Frank
H. Koraleski, for appellant.

VICTORIA BOYCEGA,

Appellee,

vs.

THOMAS JANOWSKI,

Appellant.

APPEAL FROM

SUPERIOR COURT

F. H. Jones, for appellee.

182 I.A. 7

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Appellant complains of a verdict and judgment rendered against him in a dog-biting case. His counsel maintain that the verdict is contrary to the weight of the evidence, that two of the instructions were erroneous, and that the court erred in permitting the declaration to be taken into the jury room.

Appellant admitted that he owned several dogs, one of which, a large yellow "mixed St. Bernard," he kept in his butcher's shop at night as a watch dog. Appellee testified it was this dog that bit her while she was peaceably walking along a sidewalk on a public street, and several other witnesses testified to the man-biting disposition of the dog, and to admissions by appellant that he knew "the dog was bad," but kept him nevertheless, and permitted him to run at large upon the streets unmuzzled. Appellant's defence was that he had sold that particular dog a month before, but that the dog came back on the day of the accident. There are circumstances which discredit this defense. If the jury believed the plaintiff's witnesses, it was justified in finding the issues in her favor, and we see no good reason for disturbing their verdict.

The second instruction directed a verdict for the

1851

The second investigation disclosed a number of the
 first witnesses, it was testified to finding the bodies in the
 which witnesses were taken. It was found that the bodies
 were found on the day of the accident. There were circumstances
 and with this particular day a more serious, and that the day
 upon the witness mentioned. A witness's name was that he
 had been his acquaintance, and testified to the fact of having
 and in addition by evidence that he knew the day and night,
 known testified to the non-existing condition of the day,
 almost a witness as a matter of fact, and several other wit-
 it was this day that he was killed and was seriously injured
 witness's name as a witness day. A witness testified
 at which a body was found, it was found, he was in the
 A witness testified that he was present during the day and

plaintiff if the jury believed from the evidence that defendant kept a savage dog which he knew was accustomed to bite mankind and knowingly permitted it to run at large "without being guarded or securely muzzled", and that the plaintiff was injured thereby, "in manner and form as set out in plaintiff's declaration, or any count thereof." The third count of the declaration set up a city ordinance requiring dogs to be muzzled and charged a violation thereof, but upon the failure of the plaintiff to prove the ordinance, the court instructed the jury to find the defendant not guilty as to that count. It is first objected that neither of the remaining counts avers, as a ground for recovery, that defendant failed to guard or securely muzzle the dog. The second count alleges that defendant suffered the dog "to run at large without taking due and proper care to secure the same." Technically, perhaps, this clause, standing alone, would imply a failure to tie up the dog. But it must be read with its context. The consequence alleged is the biting of the plaintiff, and certainly one way to "secure" the dog so as to prevent him from biting, was to muzzle him. It is next objected that the words "or any count thereof" permitted a recovery under the eliminated third count. It is not to be supposed that any intelligent jury would understand from the use of those words alone, that the plaintiff could recover on proof of facts alleged only in the third count, when by another instruction they were specifically directed to find the defen-

statement of the fact that the law is not a mere collection of rules, but a system of principles which are applied to the facts of life. The law is not a mere collection of rules, but a system of principles which are applied to the facts of life. The law is not a mere collection of rules, but a system of principles which are applied to the facts of life.

dant not guilty as to that count. (P. C. S. R. & Co. v. Buckley, 200 Ill. 260, 262.)

The second instruction is further objected to, upon the ground that it ignores the defense of contributory negligence. In Chicago & Alton R. R. Co. v. Zuckack, 197 Ill. 304, it was held that "it is undoubtedly the rule in this state that if the party injured has been guilty of heedlessly placing himself in the way of a vicious dog with knowledge of its propensities, or has brought the injury upon himself by his own conduct, or his fault has proximately contributed to his injury, such facts will constitute a good defense. This defense, however, depends upon knowledge, and it is only after notice that the public are required to be on their guard to avoid injury." If there were any evidence tending to prove such a defense in this case, the objection would be a good one. But the only evidence in the record resembling a defense of this character is the evidence of one Chalm, a teamster who lived "next door" to appellant. He testified that between three and four o'clock on a day not specified, he was driving his team past the place where plaintiff was injured, and saw a lady, who looked like the plaintiff, kick a yellow dog and then fall down; that he did not know whose dog it was, and that the dog did not attack or bite the woman, but ran away. We think the court did not err in ignoring the alleged defense, under these circumstances.

While the fifth instruction, relating to the measure of damages, is awkwardly expressed, we do not think it is open to the criticism made by appellant's counsel. Assuming it

to be true, as stated by counsel, that "there are many injuries which result directly from an accident of this kind for which damages may not be allowed by the jury," still there was no evidence of any injurious results of that character, and the instruction, in two distinct phrases, specifically limits the jury to the consideration of such injuries and resulting damages as were shown by the evidence.

It is finally urged that it was "bad practice" to permit the declaration to go to the jury room. Counsel admit, however, that in Lanohett v. Haas, 219 Ill. 546, such a practice was held not to constitute reversible error. While the practice in question should be avoided as much as possible, yet it not infrequently happens that counsel prepare and submit instructions so framed as to be meaningless to the jury unless they have the declaration before them. That was true in this case, and therefore the court did not err in following a practice which could not well be avoided under the circumstances.

The judgment will be affirmed.

AFFIRMED.

March Term, 1912, No. 1
349 - 18,592.

*By John A. Bloomington,
for appellant.*

OTTO G. LOGAN, Appellee,

vs.

GEORGE W. JACKSON,
Incorporated,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

182 I.A. 99

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In October, 1909, appellee, an experienced structural iron worker, was in the employ of appellant, who was engaged in constructing a bridge on the "Mayfair out-off" of the Chicago & Northwestern railway. The railroad runs east and west and before appellant began its bridge work, two concrete abutments had been erected about sixty feet apart and one hundred feet in length from north to south. The side facing the center of the bridge, in each of these abutments, was perpendicular from the base to about seven feet from the top, where there was a ledge or offset upon which the ends of the bridge girders were to rest. At the back and at both ends, the abutments were constructed in the form of huge steps. The excavations made to receive the abutments had not been back-filled, and on the east side of the east abutment a plank, or two laid across, afforded the workmen means of access from the "shore" to the abutment.

Just before the accident, a twenty-seven ton girder had been lifted by a derrick to a position immediately above the ledges above described and was hanging in chains between

the two abutments. Appellee assisted in placing the east end in its proper position on the ledge, and was then told by the foreman to "run across there and help that man to set the other base." Appellee climbed upon the girder, and ran over upon it to the top of the west abutment. Then, in order to get down to the level of the ledge upon which the girder was to be set, he ran to the north end of the abutment and jumped down the steps. A small piece of plank, from which a large nail was protruding, was lying loose upon the second step, and appellee jumped upon the nail and sustained a painful injury. He testified that it was a clear, bright day; that if he had looked before he jumped, he would have seen the nail; and that such pieces of wood and nails were sometimes used for scaffolds in doing the kind of work in which he was then engaged. He also testified that he did not know how the piece of plank came to be there, nor how long it had been there. There is no evidence in the record bearing upon these questions. Appellee recovered a judgment for \$700.

We are unable to see any theory of liability upon which this judgment can be sustained on the facts shown. While it is unquestionably true that it was appellant's duty to use ordinary care to furnish the appellee with a reasonably safe place in which to work, yet, in order to recover for an alleged neglect of that duty, it was incumbent upon the appellee to show not only that a defect or danger existed in the place furnished but also that appellant had notice, or knowledge thereof, or ought to have had, and that appellee did not know it, nor have equal means with appellant of knowing it.

(Montgomery Coal Co. v. Barringer, 218 Ill. 327; Galloway v. C., B. & N. Ry. Co., 254 Ill. 474.) Appellee's counsel insists that the evidence of appellee to the effect that he saw the foreman use the same steps in the same manner at least five times prior to the accident is sufficient to charge appellant with knowledge of the presence of the piece of board with the upturned nail and the danger of leaving it upon the steps. But there is no evidence that the board was there at those times. For aught that appears from the evidence, it may have been thrown there, or dropped by some fellow workman a moment or two before the accident happened. Hence, irrespective of any question of contributory negligence on the part of appellee, in failing to look before he jumped, and irrespective of all question as to whether appellee did not have equal opportunities with appellant to see and to know the danger, the proof wholly fails to show that appellant had, or ought to have had any knowledge or notice of the defect which caused the injury.

Furthermore, we think the principle which applies to injuries resulting from temporary changes during the progress of the construction or demolition of buildings, is applicable to the facts of this case, and that the court erred in refusing an instruction embodying that principle, offered by appellant. In Tells Bros. Co. v. Manion, 140 Ill. App. 527, it was said by Mr. Justice Brown, of this district, that "it cannot be the law that when the building is in process of construction an employing owner or contractor, under the general

doctrine of his obligation to furnish his employes a safe place to work, is liable for injuries to one of them caused by his stepping in broad daylight on a nail or spike protruding from material either discarded or to be used, which is lying about." In such case, the risk of injury from such temporary conditions of danger is in most cases one of the ordinary and usual risks incident to the employment which is assumed by the contract of employment. So far as the evidence shows, that was true in this case, and the instruction should have been given.

For the reasons stated, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator will then gather information about the problem and the people involved. This information will be used to develop a plan of action.

March Term, 1912, No.
379 - 18,424.

SAM WEIL,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Franklin B. Huessey and C. C. Brown, for appellant; Leonard U. Busby, Jr. counsel.
Levy & O'Donnell, for appellee.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

182 I.A. 109

Appellee recovered a judgment against appellant for

\$2,000 for personal injuries sustained in a street car accident.

As we have reached the conclusion that the judgment must be reversed on account of errors in the instructions, only a brief outline of the facts will be stated. Appellant operates a

double-track street car line on Wabash Avenue. Appellee is the driver of a mail wagon and just before the accident was driving east across Wabash Avenue at the intersection of Peck Court.

Before reaching the tracks appellee saw a street car approaching from the south on the east track. It was 10:30 o'clock at night. The street was well lighted and there was nothing to obstruct his view of the approaching car. He testified that when he first saw the car, it was approximately 300 feet away from him; that just before his horse stepped over the west rail of the east track he looked again and saw that the car was only 60 or 70 feet from him, whereupon he "whipped up" his horse.

At the same moment the motorman endeavored to stop the car, but was unable to do so in time to prevent a collision. The car struck the hind wheel of the mail wagon and appellee was thrown to the ground. Whether the motorman was to blame for the accident, and whether appellee was exercising due care, were close

NEW YORK, N.Y.,
MAY 10, 1914.

Dear Sir,
I have the honor to acknowledge the receipt of your letter of the 5th inst. in relation to the matter of the proposed extension of the New York City and County Water Supply Commission.
I am sorry that I am unable to give you a more definite answer at this time, but I am sure that the Commission will be able to give you a satisfactory answer in the near future.

Very truly,
J. A. L.

I am sorry that I am unable to give you a more definite answer at this time, but I am sure that the Commission will be able to give you a satisfactory answer in the near future.

I am, Sir, very truly,
Your obedient servant,
J. A. L.

questions of fact under the evidence, and it was therefore important that the instructions should be accurate.

The eighteenth instruction given to the jury on behalf of appellee stated that if the jury believed from the evidence that the motorman either saw, or by keeping a vigilant watch could have seen the horse and wagon moving toward and across the tracks and in danger of injury, and that if the motorman could then have averted the collision "by stopping said car within the shortest time and space possible under the circumstances," but neglected to do so, then, if the jury further believed from the evidence that the plaintiff exercised ordinary care in driving toward and across the tracks, the verdict should be for the plaintiff.

The twentieth instruction stated in substance, that, if the jury believed from the evidence that the motorman did not use ordinary care to observe the position of the plaintiff, and that if he had exercised such care "he could have seen the wagon in time to have stopped his car or slackened its speed so as to have avoided injury to the plaintiff," and that the plaintiff was injured "on account of such neglect," the jury should find a verdict for the plaintiff. Both of these instructions, in our opinion, are erroneous. In effect, the eighteenth instruction told the jury that the law required the motorman, as soon as he saw or could have seen that the plaintiff was crossing ahead of his car, to stop his car "in the shortest possible time and space" in order to avert a collision. The twentieth instruction, in effect, states the same alleged

principle in a different form. Neither instruction is an accurate statement of the legal rule applicable to the facts of this case. It was the duty of the motorman only to exercise ordinary care under the circumstances to avoid the collision, and not the utmost possible diligence, which is clearly implied by these instructions. It is true that by another instruction (the twenty-sixth) the jury were told that the defendant was not required to exercise the highest degree of care, but only such care as a person of ordinary prudence would exercise under like circumstances; but as both the eighteenth and twentieth directed a verdict if the jury found the facts to be as therein stated, the error could not be cured by other instructions. Moreover taking all three of these instructions together, the jury would be apt to conclude that the failure of the motorman to stop his car in the shortest possible time and space, or his failure to do any other act which was "possible" under the circumstances, was, necessarily and as a matter of law, a failure to exercise the care which a reasonably prudent person would exercise under like circumstances.

Both the eighteenth and twentieth instructions are open to the further objection that they assume that a particular act or omission, on the part of the motorman, would constitute negligence. "Instructions assuming the existence of any material fact have always been condemned." I. C. R. R. Co. v. Johnson, 221 Ill. 42.

The error in giving these instructions was increased by the refusal of the court to give defendant's instruction

number 6. It correctly stated the rule applicable to the defendant's theory that the plaintiff drove in the way of the car so suddenly that the motorman had no such notice of danger as to give him an opportunity to avoid the collision by the exercise of ordinary care and skill. There was evidence tending to support this theory, and the principle therein stated was not covered by any other instruction. It was error to refuse it.

For the reasons given, the judgment of the Circuit Court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

*H. Matthew P. Brady, for
appellant Jacob Levy.*

ISAAC ELATKIN, et al.,
Appellees,
vs.
MORRIS L. GOLDBERG, et al.,
JACOB LEVY,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.
*F. B. Hovey and
Edmund W. Froehlich
for appellees.*

182 I.A. 111

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Appellees, Isaac Elatkin, having recovered a judgment against Morris L. Goldberg, filed his bill in the Superior Court against said Goldberg and the appellant, Jacob Levy, in which it was alleged that Goldberg had conveyed all his property to Levy for the purpose of defrauding creditors. The bill sought to have the real estate so conveyed subjected to the lien of Elatkin's judgment. Goldberg and Levy answered, admitting the recovery of the judgment, but denying that the conveyance was made for the purpose of defrauding creditors. Replications were filed to the answers, after which appellee, Ludwig Koepke, filed an intervening petition, setting up the recovery of a judgment in his favor against Goldberg and asking that the property conveyed be also subjected to the payment of his judgment. The answers of Levy and Goldberg to the original bill were by stipulation ordered to stand as answers to the intervening petition. After an extended trial before the court, a decree was entered finding that the deed from Goldberg to Levy was made in bad faith and without consideration; that Goldberg was in equity the real owner of the premises conveyed

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by him to Levy; and that the property was subject to the lien of appellee's judgments. From this decree Jacob Levy has perfected an ^{appeal} ~~ap~~-_{al} to this court. While he has assigned a number of alleged errors, the one error discussed in the brief is that the decree is contrary to the evidence, or, in other words, that the fraud alleged in the bill of complaint and intervening petition was not established by the evidence.

In view of the earnest argument and extended presentation of the facts submitted by counsel for appellant, and of the meagre reply thereto by appellees' counsel, we have found it necessary to carefully sift and study all of the evidence contained in the record. After such examination, we find it very difficult to determine, with any degree of certainty, whether the transaction in question was a bona fide transaction, or otherwise. Although Goldberg filed an answer, as above stated, denying the alleged bad faith of the conveyance to Levy, yet during the trial, he, for some reason, discharged the counsel he had originally employed and took the stand as a witness against appellant. His story is that, finding himself very much in debt and unable to pay his debts as they matured, he applied to appellant, who is his son-in-law, and who is a lawyer, for advice and assistance; that appellant prepared, and Goldberg and his wife executed, a quit-claim deed of all his real estate and all his personal property to appellant, with the understanding that appellant would take charge of all his property and affairs, collect his outstanding accounts, settle with the creditors, and when matters were

straightened out, to "give back" the property. There are many circumstances connected with the transaction, as shown by the evidence, tending to support Goldberg's version of the matter.

On the other hand Goldberg's general reputation for truth and veracity was assailed by several witnesses, and appellant denied that he ever made any such agreement, or that he understood the matter in the same light as Goldberg and his wife. His version was that he purchased all the property outright, in good faith and for a valuable consideration. There are circumstances in the record which tend to support appellant in this theory, but there are also circumstances tending to discredit and cast doubt upon it. The alleged consideration for the transfer was the immediate payment of some small bills, amounting to \$200, the cancellation of a claim by the son-in-law against the father-in-law for attorney's fees, and the subsequent payment of claims held by Morris & Co. and Armour & Co. against Goldberg, which appellant testified were so urgent that special provision had to be made to meet them, in order to prevent the arrest of Goldberg upon a charge of obtaining credit by means of false statements. Appellant proved that these considerations were in fact paid, but Goldberg testified that no part of the money thus paid was appellant's money, but was money that belonged to Goldberg and came to appellant by reason of the position he occupied as the ostensible owner of the property and business of Goldberg.

In this state of the record we must, in the nature of things, be guided very largely by the determination of the

chancellor, who saw and heard the witnesses. It is impossible for us, reading, as we must, from the typewritten pages of the record, to know how these witnesses appeared to him upon the stand, and with what apparent candor and frankness they testified. One fact stands out prominently and without serious dispute, namely, that as a result of the transactions in question all the property of Goldberg, after his undoubted insolvency, passed from his control into the control of appellant for a nominal consideration which could easily have been paid, as Goldberg says it was, out of the property transferred. The appellant's theory that such a conveyance was made simply to save the good name of Goldberg is contradicted by the fact that the settlement made with Morris & Co. was not made for several months after the property was transferred.

We cannot say that the findings of the chancellor are manifestly contrary to the evidence, and therefore the decree will be affirmed.

Affirmed.

[illegible]

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation. Finally, the last step in the process is to evaluate the results of the implementation. This involves determining whether the problem has been solved and whether the resources have been used effectively.

[illegible]

100-443887-100

10. The Commission has also received information from the Government of the United States of America that the United States has provided military assistance to the Government of the United States of America.

100-443887-100

October Term, 1911.

48 - 17566.

REID, MURDOCH & CO., a Corpor-
ation,
Defendant in Error,
vs.
SOMERSET CANNING COMPANY, a
Corporation,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

182 I.A. 112

STATEMENT. This is an action by the buyer against the seller for damages for the non-delivery of 5,500 dozen cans of tomatoes, being 2750 "cases". Reid, Murdoch & Co., a corporation, of Chicago, Illinois, (hereinafter called plaintiff) was the buyer, and Somerset Canning Company, a corporation, (hereinafter called defendant) which conducted a canning factory at Still Pond, Maryland, was the seller. The contract of sale was cancelled by the defendant, and the delivery of the tomatoes refused, solely on the ground of the failure, as defendant claimed, of plaintiff to send shipping directions promptly. Plaintiff claimed damages of 7 1/2 cents per dozen cans, or a total amount of \$412.50. The case was tried before the court without a jury, resulting in a finding and judgment against defendant for said amount, which judgment it is sought by this writ to reverse.

The facts are substantially as follows: In July, 1910, defendant had appointed Smith, House & Webster Co., (hereinafter called the Smith Co.) of Bel Air, Maryland, a suburb of Baltimore, Maryland, as its factors, with power to control the sale of its "entire pack of canned goods". A. E. Midwell was a canned goods broker at Baltimore, and the Tom Brown Merchandise Brokerage Co. (hereinafter called Brown) was also a canned goods broker at Pittsburgh, Pa. On August 24, 1910, Midwell received a telegram from Brown ordering, on behalf of plaintiff, five car loads

of "Moon Brand" tomatoes. This order Kidwell telephoned to Smith Co., and that company tentatively accepted it on behalf of defendant. On August 25th, Smith Co. wrote Kidwell confirming telephone conversation and the sale to plaintiff, for account of defendant, of "3000 cases * * tomatoes, prompt shipment, \$7 1/2 cents, less 1 1/2 per cent., f.o.b. factory", and further saying, "Please let us have shipping directions promptly. As soon as we get your letter, we will pass contracts". On the same day Kidwell signed and mailed to Smith Co. a "sales ticket", setting forth a sale to plaintiff for account of Smith Co. of 3000 cases of said tomatoes, at "\$7 1/2 cents dozen". Terms "2 per cent., less 1 1/2 Balto. rate freight", and saying as to shipment, "Hold for instructions". Kidwell, also, on the same day, signed and mailed to Brown another "sales ticket", evidencing the same sale, but it was not an exact duplicate of the one mailed to Smith Co.; it set forth a sale to plaintiff for account of defendant of 3000 cases of said tomatoes, at "\$7 1/2 cents dozen", with the additional words "like samples, Cans to be absolutely bright and clean and cases new and neatly stencilled", and mentioned the terms as "less 1 1/2 10 days Balto. rate freight", but said nothing as to shipment. Kidwell, a witness for defendant, deposed that sales of this character were usually consummated by issuing duplicate sales tickets, one to the seller and one to the buyer, that in this case he sent the original to the Smith Co. and a duplicate to Brown, and that the words "Hold for instructions", contained in the original sent to Smith Co., meant in the trade that the routing and destination of the shipment would be furnished by the buyer before the seller might ship. When this last mentioned sales ticket was received by Brown, he in turn sent it to plaintiff, and when it was received by plaintiff it bore an endorsement in lead pencil on its face, "This was changed to read 5 cars,

550 cases each", underneath which was the stamped signature "Tom Brown Mdse Bro'ge Co., P." On August 25th, also, Brown wrote Kidwell, acknowledging receipt of "contract" for 3000 cases of tomatoes sold to plaintiff and saying, "These people want five minimum cars, 550 cases each, so kindly change this order to read this way. This is a total of 2750 cases. * * We hope to be able to send you shipping instructions on these goods in the next day or two, as soon as we receive them from the buyer. * * These shipments do not go to Chicago, so hold until you receive shipping instructions." Kidwell testified that he received this letter on August 25th, that he immediately communicated the contents thereof to Smith Co., and that no objections thereto were raised by that company. On August 25th, also, Brown wrote defendant, at Still Pond, Md., advising defendant of the sale on its account to plaintiff of five cars of tomatoes, 550 cases each, 5500 dozen at 47 1/2 cents, "to be shipped _____ by _____. Terms _____ days acceptance or 1 1/2 off for cash in ten days. * * With Balto. rate of freight. Guaranteed to comply with the National pure food law. Six months' guarantee against swells and leaks. Hold for shipping instructions." Upon the receipt by Smith Co. of the original "sales ticket" executed by Kidwell on August 25th, the Smith Co., on August 25th, executed in triplicate copies its sales ticket, or contract, dated August 25th, sending one copy to Kidwell for plaintiff and another copy to defendant at Still Pond, Md., and retaining one copy. This sales ticket or contract mentions the sale to plaintiff for account of defendant of 3000 cases of the tomatoes at the price above mentioned, "terms cash less 1 1/2% in 10 days; delivered f.o.b. Still Pond, Md.; * * to be shipped promptly as per instructions later. Swells guaranteed for six months from date of invoice. * * Goods guaranteed to comply with National pure food law. During season, seller's option of time. * * It is un-

derstood that 'season' in this contract means the time of the packing and the time required after the close of the packing for the prompt labelling of the goods". The copy of this sales ticket or contract forwarded to Kidwell by Smith Co. was in turn forwarded by Kidwell to Brown. On August 27th, Brown wrote plaintiff confirming the purchase by plaintiff from defendant of "five cars, 550 cases each" of the tomatoes, and saying, "We are enclosing sales ticket to cover this sale. * * Kindly give us shipping instructions on this sale as soon as possible, as our packer is anxious to start to move a car or two of these goods". This letter was received by plaintiff on Monday, August 28th. On August 28th, plaintiff wrote to defendant, at Still Pond, Md., giving it full shipping directions for the 2750 cases of the tomatoes, requesting that the invoices and bills of lading be sent to plaintiff promptly. These shipping instructions were evidently received by defendant on or prior to September 2nd, for on that date the manager of defendant, Mr. Oliver, wrote the Smith Co., "I return Reid, Murdoch & Co.'s shipping instructions. These goods were sold for immediate shipment. I wired you and wrote you and called you up over the phone. Being unable to get shipping instructions, I have cancelled the order". Immediately following the execution in triplicate of the sales ticket or contract by the Smith Co. on August 28th, the Smith Co., who were in constant communication with defendant by telephone, made frequent demands by telephone on Kidwell for immediate shipping directions, and, as those directions were not received, the Smith Co., on September 1st, wrote Kidwell that the "Reid Murdoch contract had been cancelled" and further saying, "We have telephoned you every day for instructions and told you Tuesday (viz: August 30th) we could not hold the goods and had cancelled the sale". It thus appears that on the same day that plaintiff mailed defendant shipping instruc-

tions, the defendant, by its factor, Smith Co., cancelled the sale. On September 1st the five cars of tomatoes were resold to Seeman Brothers, of New York City, at the same price as contracted to be sold to plaintiff. On September 3rd, Brown wrote plaintiff that the sale had been cancelled "on account of failure to receive shipping instructions". This letter was received by plaintiff on Monday, September 5th, and on that day they replied to Brown, expressing "astonishment" and saying that on August 30th it had written defendant giving "complete instructions for prompt shipment", and on September 8th plaintiff wrote Smith Co., stating that shipping instructions had been sent on August 30th and requesting the Smith Co. to see that the order for the tomatoes was filled. To this letter Smith Co. replied on September 10th, saying that under the facts as outlined in plaintiff's letter "the packers might reasonably be expected to make delivery", and stating the reasons which actuated them in cancelling the sale. Plaintiff received this letter on Monday, September 12th, and immediately replied by telegram saying, "packer must fulfill contract and deliver goods or must pay our loss in replacing goods. We have resold the goods * * and customers are pressing us". Smith & Co. replied on the same day by wire that the sale of the tomatoes was "for immediate shipment", and the sale had been cancelled because of failure to send shipping directions promptly, and that this was "final". On September 13th plaintiff wired defendant at Still Pond, saying, "We gave prompt shipping directions and you must fulfill contract or pay our loss in replacing." Plaintiff commenced the present suit on October 5, 1910.

H. E. Stearns, manager for thirty years of the canned goods department of plaintiff, testified on behalf of plaintiff, without objection being made by defendant, that under the customs and usages of the canned goods trade the terms "to be shipped

promptly" mean that the goods are to be shipped by the seller within 10 or 15 days from the date of the order to ship; that where a contract provides for the "prompt" shipment of goods that are to be held for shipping instructions, such instructions, under the usage of said trade, should be given by the buyer within 10 or 15 days. Charles E. Newton, employed by plaintiff for many years, also testified on behalf of plaintiff, without objection, to the same effect.

As to the usual and customary manner of a purchaser giving shipping instructions, Stearns and Newton testified that it was not usual in the canned goods trade to give shipping instructions by wire, but by mail. R. Harry Webster, secretary of Smith Co. and a witness for defendant, deposed that the usual way was for the purchaser to mail written shipping instructions, but that it was not unusual to receive them by wire or telephone, to be confirmed by letter.

*William Ritchie and Sadron B. Meyer, for plaintiff in error
Johnson & Johnson, for defendant in error.*

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for defendant that the judgment should be reversed because it does not appear from the evidence that any definite contract was made between the parties, or that there was the necessary "meeting of the minds". We are of the contrary opinion. We think that under all the evidence the defendant, through its factor, Smith Co., made a contract with the plaintiff, through its broker, to sell it five cars of 550 cases each of canned tomatoes, of the grade mentioned, or a total of 2750 cases or 5500 dozen cans, at \$7 1/2 cents per dozen cans, less a cash discount, f.o.b. at defendant's factory, to be shipped promptly by the defendant after plaintiff had given instructions where to ship the goods. We are further of the opinion that the contract as made did not contemplate that

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the "Black Panther Party" in the United States. The Commission is therefore unable to provide any information regarding the activities of the "Black Panther Party" in the United States.

It is the duty of every citizen to support the Government in its efforts to maintain peace and order.

It is contended by counsel for defendant that the law-
suit should be reversed because it does not appear from the
evidence that any tortious conduct was done between the parties.
We find there was the necessary "meeting of the minds," as the
of the contrary evidence. We think that under all the evidence
the defendant, through its broker, which we, made a contract
with the plaintiff, through its broker, to sell it five cars of
and more out of current inventory, at the price mentioned, on a
total of \$100,000.00, to be paid in cash, at 10% down and
balance over, less a cash discount, 2.5%, if defendant's delivery
is by railroad freight by the defendant, after plaintiff has
given instructions there to ship the goods. We are further of
the opinion that the contract as made is not confidential and

immediate shipping directions should be given by plaintiff or that an immediate shipment of the goods should be made by defendant in accordance therewith. And we think that, under all the facts in evidence, the defendant was not justified in cancelling the sale through its factor Smith Co., on the date that the evidence shows it was cancelled, solely because of the fact that shipping instructions had not then been received from the plaintiff, which, as testified by the witness Dallam, president of Smith Co., was "the only reason" for such cancellation.

It is also contended by counsel for defendant that the judgment should be reversed because it appears from the evidence that the plaintiff had notice of defendant's cancellation of the sale in abundant time to have procured the same goods elsewhere in the market at the price contracted for, before the market price had advanced, and that the plaintiff was bound to use all reasonable efforts to prevent or minimize loss. It appears from the evidence that the market price of the goods in question was the same as the contract price, namely 67 1/2 cents per dozen cans, from August 23th to September 5th; that from September 5th to 8th the price was 70 cents; that on September 8th and 10th it was 72 1/2 cents; and that from September 10th to 17th it was 75 cents per dozen cans. It further appears from the evidence that the first advices which plaintiff received that the sale had been cancelled by defendant was on Monday, September 5th, in a letter from Brown, dated Saturday, September 3rd, and cancelled for the reason (as stated in the letter) of a "failure to receive shipping instructions", and that this information came as a surprise to plaintiff, because on August 30th it had promptly forwarded shipping instructions to the defendant. We are of the opinion that at this date the plaintiff was justified in thinking that a mistake had been made and that the sale would

yet be consummated, and that, in view of the subsequent correspondence had between plaintiff and the Smith Co., plaintiff was further justified in believing that defendant would yet deliver the goods, up to the time when, on September 12th, it received the "final" word from Smith Co. that the sale had been cancelled. At this date the market price of the goods at the place of delivery was 75 cents per dozen cans, or 7 1/2 cents over the contract price.

Other points are elaborately argued by counsel for defendant and replied to by counsel for plaintiff, but we do not deem it necessary to discuss them. Suffice it to say that after careful consideration we are of the opinion that the finding and judgment are amply supported by the evidence and by the law, and that substantial justice has been done. The judgment is therefore affirmed.

AFFIRMED.

Mr. Justice Fitch dissents.

THE DEPARTMENT OF THE ARMY, WASHINGTON, D. C., MAY 1, 1900.

SIR:

I have the honor to acknowledge the receipt of your letter of the 28th inst., and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,
Your obedient servant,
J. H. COOPER,
Major, U. S. Army.

Justice Fitch dissenting.

95 - 17615.

STANLEY CIECIERSKI,
Defendant in Error, }

vs. }

MARTIN HERMANSKI,
Plaintiff in Error. }

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

*No appearance for defendant
in error.*

182 I.A. 113

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Stanley Ciecierski, plaintiff below, commenced a tort action in the Municipal Court of Chicago against Martin Herman-
ski, defendant below, to recover damages sustained by reason of
being bit on the fore-arm by a large dog, owned by defendant. It
was charged that defendant wrongfully and negligently permitted
the dog to run at large, unmuzzled, in and about defendant's
premises, and that the defendant knew, or should have known, that
the dog was vicious. The case was tried before a jury who, by
their verdict, found the defendant guilty and assessed plaintiff's
damages at the sum of \$75, and the trial court entered judgment on
the verdict. The defendant in error did not file an appearance in
this court.

It appears from the evidence that defendant was engaged
in the saloon business at No. 8556 Superior Avenue, Chicago;
that about 14 feet south of the south side of the saloon building
there were railroad tracks; that the open space between was used
as a passage-way and that the saloon had a side door or entrance
facing said open space and tracks; that the defendant usually
kept the dog chained in the yard in the rear of the saloon in the
day time, although he sometimes allowed the dog to be "loose in
the saloon", and that during the night he had the dog in the
saloon as a watch-dog; that on the afternoon of December 1, 1910,
plaintiff, who lived about eight doors north of defendant's saloon
and in the same block, left his home, in company with one Grain-

ski, and while they were walking east in said open space along the side of the saloon and near said side entrance, the unmuzzled dog, without provocation, jumped on plaintiff and bit him on the fore-arm, - making a hole in the sweater, which plaintiff wore, and four marks on his arm, causing the arm to bleed. Plaintiff testified that the wound "began to swell right away" and he immediately consulted a physician; that the physician dressed his arm every day for fourteen days; that as a result of the "bite" he was unable to work during that period and lost his wages of \$2. per day, and that his doctor's bill was \$14. Plaintiff further testified that he had known the dog for a long time, had seen it run after, but not bite, other persons, and that it had chased plaintiff on one occasion about one year previous. John Majkowski, a witness for plaintiff, testified that the dog "jumped on people"; that it jumped at him once and grabbed him by the arm, and that he saw it run after other men. On the trial plaintiff introduced, without objection, an ordinance of the City of Chicago, in force at the time in question, to the effect that it was unlawful for the owner of a dog to permit it to run at large on any street, alley or other public place, "unless such dog shall be securely muzzled so as to effectually prevent it from biting any person or animal", and providing for a fine in case of violation of the ordinance. Plaintiff also introduced, over objection of defendant, a certified copy of the records of the Municipal Court of Chicago, showing the assessment of ^a fine against Martin Hermanski, (the defendant in the present action) in a case brought against him for violation of said ordinance, in which case the plaintiff herein was ^{the} prosecuting witness. The defendant and his son testified that defendant had owned the dog about three years, that it was "a good, quiet dog and a good watch-dog". Several witnesses for defendant testified that they

[illegible]

"never saw the dog bite or attempt to bite anybody", and two witnesses testified that they had seen the dog loose many times in and around the saloon and unmuzzled.

"The owner of domestic or other animals not naturally inclined to commit mischief, as dogs, horses and oxen, is not liable for any injury committed by them to the person or personal property of another, unless it can be shown that he previously had notice of the animal's mischievous propensity, or that the injury was attributable to some other neglect on his part, it being, in general, necessary, in an action for an injury committed by such animals, to allege and prove the scienter". (Mareau v. Vanatta, 68 Ill. 132-3).

It is urged that ^{the} evidence does not support the verdict and judgment, in that the scienter was not sufficiently proved. To this we cannot agree. "The scienter may be established by attendant circumstances, without the necessity in all cases of proving prior cases of injury". (2 Am. & Eng. Encyc. Law - 2nd Ed.-p. 369; Chicago, etc. N. Co. v. Kuckkuck, 98 Ill. App. 252, 257, aff'd. 197 Ill. 504.) The testimony disclosed that the dog was used as a watch-dog to guard the saloon premises in the night time; that in the day time the dog was usually chained in the yard, but that frequently the defendant allowed it to run at large, unmuzzled, in violation of the City ordinance. We think that it was a question for the jury whether, under all the facts and circumstances in evidence, the defendant had notice of the dog's "mischievous propensity", or that plaintiff's injury was attributable to defendant's neglect, (Rightlinger v. Egan, 75 Ill. 141-2; Goode v. Martin, 57 Md. 606; Bahnke v. Friederich, 140 N. Y. 224, 227), and we are not disposed to disturb the verdict. There was no evidence that the plaintiff wantonly irritated and aggravated the dog. (Mareau v. Vanatta, supra.) And no point is made that the verdict is excessive.

And we do not think that the trial court committed prejudicial error, as contended by counsel, in admitting in evidence

10-10-68

... ..

THE UNITED STATES OF AMERICA
DO hereby certify that
the within and foregoing is a true and correct
copy of the original as the same appears
in the records of the Department of the Interior
at Washington, D. C.

[illegible]

THE UNIVERSITY OF CHICAGO PRESS

...the ... of

Author's address: Department of Psychology, University of Cambridge, 18a Avenue Road, Cambridge CB3 9ET, UK. E-mail: ajm22@cam.ac.uk

Figure 1. The mean and standard deviation of the 1000 simulated data sets for the 1000 simulated data sets.

1. The first group of authors (e.g., [1, 2]) considers the problem of the stability of the motion of a system of particles in the field of a central force. The authors show that the motion of a system of particles is stable if the potential energy of the system is a function of the distance from the center of mass of the system to the center of force.

Source: *U.S. Census Bureau, Bureau of Economic Analysis, "GDP by State and Selected Regions, 1997-2000,"* <http://www.bea.gov/states/gdp.htm>.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

[illegible]

1. The following are the names of the persons who are to be included in the list:

1967-1968

The vessel is described as follows:

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

negative of which is of, issued by Bureau of Information in, very limited

the record of the Municipal Court showing that defendant had been fined under the city ordinance, upon complaint of the plaintiff, for permitting a dog to run at large unmuzzled. The judgment is affirmed.

AFFIRMED.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States.

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

181 - 17711.

R. C. BADEAUX, doing business as

R. C. BADEAUX & CO.,

Defendant in Error,

vs.

AUGUST ROHRER

and MARIE ROHRER,

Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

182 I.A. 114

STATEMENT. Defendant in error, hereinafter called plaintiff, brought an action of the fourth class in the Municipal Court of Chicago against plaintiffs in error, hereinafter called defendants, to recover for certain monies advanced and for commissions claimed to be due him, as a licensed real estate broker, for presenting a purchaser for certain real estate, owned by the defendants and which they desired to sell, which purchaser was ready, willing and able to make the purchase and entered into a written contract with the defendants so to do. The transfer of the property to the purchaser was not consummated. The case was tried before the court without a jury, resulting in a finding in favor of plaintiff for \$152.60, upon which judgment was entered against the defendants.

The material facts are: In September, 1910, the defendants listed the property with the plaintiff for sale. It consisted of one lot on Fleurnoy street, in the city of Chicago, improved with a two-story brick building, having a bay window on one side. Plaintiff presented to the defendants one John Corboy as a probable purchaser. In the preliminary negotiations it appeared that defendants would sell for \$5,000 in cash, but that Corboy had only about \$2,100 in ready money, and it was arranged that plaintiff should obtain a loan on the premises, in order that the defendants at the time of the transfer might receive the entire purchase price in cash. On September 24th, a written contract was signed by Corboy and both defendants, in

which Corboy agreed to purchase the property at the price of \$5,800, and the defendants agreed to sell the same and to convey to Corboy "a good and merchantable title thereto by general warranty deed". The contract further provided, inter alia, that the agreement was "subject to R. A. Badeaux & Co. securing a loan of \$5500 on said premises for five years at 5 1/2% interest at time of passing deed"; that the "purchaser has paid \$100 as earnest money, to be applied on such purchase when consummated, and agrees to pay within 5 days after the title has been examined and found good, or accepted by him * * the further sum of \$5500, * * provided a good and sufficient general warranty deed, conveying to said purchaser a good and merchantable title of record, shall then be ready for delivery"; that a "complete merchantable abstract of title, or merchantable copy, brought down to the date hereof, shall be furnished by the vendor"; that the "purchaser, or his attorney, * * shall within 60 days after receiving such abstract deliver to the vendor or his agent * * a note or memorandum in writing, * * specifying in detail the objections to the title, if any"; that "in case material defects be found in said title, and so reported, then if such defects be not cured within 60 days after such notice thereof, this contract shall, at the purchaser's option become null and void, and said earnest money shall be returned"; that "should said purchaser fail to perform this contract promptly on his part, * * the earnest money * * shall, at the option of the vendor, be retained by the vendor as liquidated damages"; that "said earnest money shall be held by R. A. Badeaux & Co. for the mutual benefit of the parties concerned"; that "it shall be the duty of R. A. Badeaux & Co., in case said earnest money be retained as herein provided, to apply the same, first, to the payment of any expenses incurred for the vendor by his agent in said matter, and, second,

to the payment to vendors' broker of a commission of \$ 1/8% on the selling price herein mentioned, for his services in procuring this contract".

At the time said contract was signed the defendants requested plaintiff to have the abstract of title brought down to date, and plaintiff paid the Chicago Title & Trust Co. the sum of \$12.00 for the continuation. The attorney of Corboy examined said abstract. Plaintiff obtained the promise of a first mortgage loan for \$5000 from Greenebaum & Sons, and Corboy and plaintiff arranged with another party for a second mortgage of \$500, so that defendants might get the purchase price in cash at time of passing the deed. Greenebaum & Sons, however, required a guaranty policy before making their loan, and an application for such a policy was made by plaintiff to said Chicago Title & Trust Co. That company, after examination of the abstract of title, declined to guarantee the title because it was found that the bay window on the side of the building on said premises extended over on the adjoining lot about 3 inches. Subsequently a meeting was held at the office of Corboy's attorney, at which August Kohrer, his son, plaintiff, Corboy, and Corboy's attorney were present, and the question of the encroachment of said bay window, which was the only objection raised to the title, was discussed. Because of this encroachment, Corboy's attorney advised Corboy not to take the property, but, according to said attorney's testimony, "Corboy was willing and able to close the deal, and offered to take the property if they (defendants) would protect him against any suit brought on account of the encroachment of the bay window. He would accept a guaranty policy, or a deed from the owner of the 3 inches, or he (Corboy) would defend himself if Mr. Kohrer would pay the expenses of procuring the loan and the guaranty policy. These items amounted to about \$75. Mr. Kohrer refused to pay

these expenses, but stated that he would, in order to close the deal, take the mortgage for \$3500 himself".

On October 31st, plaintiff caused the said contract between defendants and Corboy to be filed for record in the recorder's office of Cook County, at Corboy's request, and subsequently plaintiff paid the Chicago Title & Trust Co. for work done by it on plaintiff's application for said guaranty policy and for recording fees advanced by it the sum of \$17.95, and plaintiff also paid a surveyor the sum of \$15 for surveying said premises. Plaintiff testified that August Rohrer authorized him to incur this survey expense, but Rohrer denied this. Subsequently plaintiff, at Corboy's request, returned to him the \$100, earnest money, which had been deposited with plaintiff in accordance with the contract. Plaintiff claimed at the trial that he was entitled to \$140 as commissions, which is 2 1/2% on the purchase price of \$5,600, and to the said disbursements made by him for continuation of abstract, for work done on application for guaranty policy and recording fees, and for survey. The court allowed plaintiff commissions of \$140 and \$12.60 for disbursement for continuance of abstract.

It further appeared from the evidence that the owner of the adjoining lot, on whose premises the bay window encroached, lived in McHenry, Illinois, and that on November 4th, plaintiff suggested to August Rohrer that he go and see her. Rohrer replied that plaintiff had better go, and asked plaintiff what the expense would be, to which plaintiff replied, "\$25 for my time and expenses". Rohrer said he would talk with his son. On the evening of the same day, Rohrer and his son called on plaintiff at the latter's office, and, after some conversation, the following instrument was signed by plaintiff but was not signed by the defendants or either of them:

Chicago, Nov. 4, 1910.

"R. G. Badeaux,
Chicago, Illinois.

Gentlemen:-

I hereby agree to pay you \$125 in full for your services for securing me a sale of my property, No. 3047 Flournoy St., to one J. Corboy, and for securing a waiver of claim to the three (3) inches extending over on lot next east of above premises. Consummation of sale to be within 10 days of above date.

Witnessed:
Aug. Rohrer, Jr.

Accepted,
R. G. Badeaux & Co.,
By R. G. Badeaux."

August Rohrer testified: "We talked about the question of the bay window encroaching. Badeaux wanted \$25 extra in addition to \$100 as commission, and he said that for \$25 he would get a release or waiver to the 3 inches. I agreed to this and the agreement was put in writing. * * Badeaux has never obtained a release or waiver to the 3 inches." August Rohrer, Jr. testified: "I advised father to pay the extra \$25. * * I asked Badeaux to put it in writing, at first he hesitated, but finally he wrote out the agreement on one of his own letter heads and signed it. I witnessed his signature". Plaintiff further testified that on the following morning, November 5th, August Rohrer called at his office and "asked me what I was going to do. I said I was going to McHenry as soon as they gave me the money to go. He then said: 'You need not go'." August Rohrer denied that this conversation ever occurred or that he at any time told plaintiff not to go to

McHenry.

*Adrian R. De Young, for plaintiffs in error.
J. Sinden, for defendant in error.*

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

Counsel for plaintiff contends that plaintiff is entitled to \$140 commissions by virtue of the written contract of September 24, 1910, which was signed by Corboy and by both defendants, and which fixed plaintiff's commissions as the vendors' broker at 2 1/2

Journal of Management Education 37(6)

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24. Item, which was signed by Robert and by John Williams, was

per cent. on the selling price of \$5,600, and argues that plaintiff produced a purchaser, who was ready, willing and able to complete the purchase as proposed and who entered into a binding contract so to do, and that the fact that the transfer was not consummated because of the encroachment of the bay window of the building on defendants' property over the adjoining lot, without fault of plaintiff, should not deprive plaintiff of said commissions. Under the facts in evidence in this case we are of the opinion that plaintiff is entitled to recover the sum of \$140 as commissions and the further sum of \$12.60 for money paid by plaintiff at defendants' request for the continuance of the abstract, and that the finding and judgment of the trial court should not be disturbed.

"The duty of a broker, who is employed to sell real estate, is to find and produce to the vendor a purchaser, who is ready, willing and able to complete the purchase as proposed. This he must do before he is entitled to any commissions. * * If the principal accepts the purchaser thus presented, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between them, the commission is earned. In such case, the broker had earned his commission although the sale is never actually completed, if the failure of the purchaser to complete the sale results from the inability of the vendor to make a good title, and without fault on the part of the broker." (*Wilson v. Mason*, 126 Ill. 304, 309; See, also, *Goodridge v. Holladay*, 18 Ill. App. 363, 365; *Fox v. Ryan*, 240 Ill. 391, 396.)

Counsel for defendants in his brief seemingly ignores the contract of September 24th, and relies upon the instrument of November 4th, which he calls a "written contract" between the parties. He argues that by this instrument plaintiff was entitled to only \$125, when and after plaintiff had actually consummated a sale of the premises and had secured a waiver of claim to the 3 inches of land, over which the bay window encroached, from the adjoining owner, that neither of these things had been accomplished, and that, therefore, plaintiff has no claim. This instrument is not signed by August Bohrer. On the face of the instrument itself he does not appear to have agreed to anything. Furthermore, it does not appear that plaintiff received any consideration at the time, or that any-

THESE THINGS ARE IMPORTANT TO THE SPIRIT OF THE PEOPLE AND TO THE
FUTURE OF THE NATION. WE MUST NOT LET OURSELVES BE DIVIDED BY
RELIGIOUS OR POLITICAL DIFFERENCES. WE MUST STAND TOGETHER
AND FIGHT FOR THE FREEDOM AND INDEPENDENCE OF OUR COUNTRY.
WE MUST NOT LET OURSELVES BE DIVIDED BY RELIGIOUS OR
POLITICAL DIFFERENCES. WE MUST STAND TOGETHER AND FIGHT
FOR THE FREEDOM AND INDEPENDENCE OF OUR COUNTRY.

[illegible]

THE UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20535
DIVISION OF INVESTIGATION
MEMORANDUM FOR THE RECORD
SUBJECT: [REDACTED]
DATE: [REDACTED]
BY: [REDACTED]
[REDACTED]

thing was done under the instrument. We do not think that this instrument altered or changed the rights of the parties under the contract of September 24th.

Nor do we think that there is any merit in the contention of defendants' counsel that plaintiff was guilty of a breach of trust or violation of duty in returning the earnest money to Gerbois.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

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Government should be allowed the right to the police

the right to inspect the

do not think that there is any world in the

at present, however, that I think is a

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The Government of the Republic is

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329 - 17,783.

ROSARIO FORTIER,
Plaintiff in Error,

v.

THE WESTERN FOUNDRY COM-
PANY, a Corporation,
Defendant in Error.

ERROR TO

SUPERIOR COURT

COOK COUNTY.

182 I.A. 115

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Rosario Fortier, plaintiff below, brought suit in the Superior court of Cook county against The Western Foundry Company, a corporation, defendant below, charging in his declaration that, while he was working for the defendant as a carpenter on a scaffold about 12 feet in height, the defendant negligently caused or permitted certain wires hanging near where plaintiff was at work to become charged with an electric current unknown to plaintiff, whereby plaintiff, coming in contact with said wires, received a shock and fell and was severely injured. There was also a count charging the defendant with negligence in failing to warn plaintiff of the danger. The case was tried before a jury who found the defendant not guilty, upon which finding judgment was entered, to reverse which plaintiff prosecutes this writ of error.

At the time of the accident, February 2, 1906, the defendant was having constructed an additional foundry building for its own use, and the building was nearly completed. Kohler Brothers as independent contractors were engaged in installing electric motors to be used for power and were running and attaching the necessary wires. Some of these motors were placed on shelves or platforms attached to the walls of the building some distance from the ground. Plaintiff and another carpenter were employed by defendant in constructing and attaching one of these shelves to the west wall. In order to do this they had erected, by means of

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EXHIBIT

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1821.115

THE FOLLOWING IS A SUMMARY OF THE EVIDENCE

EXHIBIT 100 - 17,762, EXHIBIT 100 - 17,762, EXHIBIT 100 - 17,762

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At the time of the accident, February 1, 1906, the de-

fendant was having constructed an additional laundry building for

the use of the laundry and the building was nearly completed. Before the

accident the defendant's contractor was engaged in installing elec-

tric wires to be used for power and were running and attaching

the necessary wires. Some of these wires were placed on shelves

or partitions attached to the walls of the building some distance

from the ground. Plaintiff and another carpenter were employed by

defendant in constructing and attaching one of these wires to

the wall. In order to do this they had stepped, by means of

wooden horses and a number of planks, a scaffold along said wall about 12 feet high. Kohler Brothers had run and attached wires, which were later to carry the current to the motor to be placed on said shelf, along the roof of the building, and at the time of the accident these wires, which were new and insulated, were hanging loosely from the roof, near the east edge of said scaffold, with their ends a short distance from the floor. Plaintiff's version of the manner in which the accident happened was that, while in a partly kneeling position on said scaffold, "I held with my left hand on the brick wall, steadying the 2x4. The nails were stuck in it. I hauled off with my right hand and struck the nail. My hammer came in contact with the wires. I felt the wires on my face, and I got a shock. The wires came to my face by catching in my hammer. * * After I got the shock I didn't know nothing". Plaintiff further testified: "I saw the wires in the neighborhood of where I was working. There were 5 wires, somewhere near the center of the scaffold. * * I did not pay any attention to the wires or make any effort to avoid them". Robert M. Murphy, who was plaintiff's co-worker on the scaffold at the time, testified that plaintiff "raised the hammer to drive the nail, and as he did so, he fell. * * He did not bring the blow down upon the nail. * * He was looking towards the nail. * * The wires might have been 6 or 8 inches to the right of him. * * He fell on his left shoulder and the side of his head onto the maple floor. * * When we commenced building the scaffold we saw the wires hanging down; we did not put them out of our way but just let them hang where they were". Dr. Bessette, plaintiff's physician, attended him shortly after the accident and while he was lying on the floor of the foundry. He testified: "I made an examination of him at that time; found evidences of concussion of the brain. * * I remember finding one mark on his forehead, about the center. * * I would describe

it as an abrasion. * * I continued to observe it. A crust formed on it. It was very slight, just an abrasion. I think it lasted seven or eight days".

At the trial, the principal controverted question of fact was whether or not there was an electrical current in the wire or wires, with which plaintiff came in contact, at the time of the accident. By the great preponderance of the evidence it was shown that they were not charged with electricity, and, in our opinion, the jury were fully warranted in finding the defendant not guilty of negligence.

The only point argued by counsel for plaintiff is that the trial court erred in the exclusion of certain evidence. Alphonse Fournier, a witness for plaintiff, testified that "I saw plaintiff the same evening after the accident; he was at home in bed; * * I observed a scar over his right eye". The witness was then asked to describe the scar and tell what it looked like, and he answered, "It looked like a burn". Defendant's attorney moved that the answer be stricken from the record, and the court said, "Strike it out. Let him tell how it looked". And the witness again answered, "It looked to me as if struck by something, and it was red all around it like a burn". On motion the words "like a burn" were stricken out. The sister of plaintiff, Delilah Pelatier, testified that she "saw him the next day after the accident; * * there was a red mark on the right side of his forehead; I saw his left hand, and there was scales on the ends of his fingers, like a burn, shiny". The words "like a burn, shiny" were stricken out. The witness further testified that "the mark on the forehead was very red, bright red. * * It looked like a burn". The words "it looked like a burn" were stricken out.

While we are of the opinion that the trial court should have allowed the testimony of both witnesses, that the scar or mark on the right side of plaintiff's forehead "looked like a burn",

it was an admission. I am not inclined to observe it. A second time
it was said. It was very slight, just an admission. I think it had
at least an effect.

At the trial, the principal concerned question of fact
was whether or not there was an electrical current in the wire
which which electricity came in contact, at the time of the
accident, by the great propinquity of the evidence it was shown
that they were not charged with electricity, and, in our opinion,
the jury were fully warranted in finding the defendant not guilty
of negligence.

The only point argued by counsel for plaintiff is that the
trial court erred in the exclusion of certain evidence. Plaintiff
submitted a witness for plaintiff, testified that "I saw plaintiff
the next evening after the accident; he was at home in bed; a
I observed a mark over his right eye". The witness was then asked
to describe the mark and he said it looked like a burn, and he answered,
"It looked like a burn". Defendant's attorney moved that the answer

be stricken from the record, and the court said, "I think it was
let him tell how it looked". And the witness again answered, "It
looked to me as if struck by something, and it was red all around
it like a burn". On motion the words "like a burn" were stricken
out. The master of plaintiff, William P. Foster, testified that
he "saw him the next day after the accident; a mark was
set over on the right side of his forehead; I saw his left hand,
and there was a mark on the side of his forehead, like a burn, shiny".
The words "like a burn, shiny" were stricken out. The witness
Foster testified that "the mark on the forehead was very red,
bright red. I saw it looked like a burn". The words "it looked
like a burn" were stricken out.

It is our duty to the jury to tell the jury what
we allowed the testimony of both witnesses, that the mark on
the right side of defendant's forehead "looked like a burn",

to stand, and should have allowed the testimony of the last named witness, that the scales at the ends of the fingers of plaintiff's left hand were "like a burn, shiny", also to stand, (1 Wharton on Evidence, secs. 510, 511; 2 Best on Evidence, sec. 517; Carter v. Carter, 152 Ill. 434; James v. State, 104 Ala. 20; Commonwealth v. Sturtivant, 117 Mass. 122) yet we do not think that, under the evidence in this case, the judgment should be reversed and the cause remanded for a new trial because of the court's rulings in these particulars. In our opinion no other verdict should have been rendered than the one rendered, even if the court had allowed the portions of the testimony of the two witnesses, which were stricken, to remain in the record.

And in our opinion the court did not commit prejudicial error, as contended by counsel, in refusing to allow the witness, Dr. Bessette, to answer certain questions asked of him relative to plaintiff's ability to hear.

The judgment is affirmed.

AFFIRMED.

MARY LUNKES,
Defendant in Error,

vs.

ALEX. CLAUSSON,
Plaintiff in Error.

} ERROR TO

} MUNICIPAL COURT

} OF CHICAGO.

182 I.A. 116

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On September 14, 1911, in an action of forcible detainer, defendant in error obtained a judgment in the Municipal Court of Chicago that she have and recover of and from plaintiff in error the possession of certain premises, and that a writ of restitution issue therefor. Plaintiff in error seeks by this writ to reverse that judgment.

Rule 13 of the Rules of Practice of this Court in part provides: "In all cases a party bringing a cause into this Court shall furnish a complete abstract or abridgement of the record. * * The abstract must be sufficient to fully present every error and exception relied upon". The abstract of record filed in this Court by plaintiff in error does not comply with the rule. It is merely an index of the transcript of the record. It is less than one printed page in length, including the errors assigned. Lack of compliance with said rule would be^a sufficient reason for affirming the judgment. (Worthy v. Bush, 174 Ill. App. 315.)

But we have nevertheless examined the transcript of the record filed in this Court. We do not find therein any bill of exceptions, statement of facts, or stenographic report of the proceedings at the trial. The transcript discloses that plaintiff commenced her action on September 7, 1911. As appears from the statement of claim, she united with her claim for possession of the premises a claim for rent "from Aug. 5th to Sept. 5th, and from Sept. 5th to Oct. 5th, 1911, at the rate of \$20 per month". This she could do by virtue of paragraph third of section 48 of the Municipal Court Act. On September 12th the defendant entered his appearance, and on September

14th the following proceedings were had and entered of record, viz: "the defendant tenders to the plaintiff in open court the sum of \$43, which sum is refused. Thereupon, on motion of plaintiff, it is ordered by the court that this suit be and it hereby is dismissed out of this Court only so far as respects plaintiff's claim for damages herein, but is retained in all other respects for further proceedings herein. Thereupon this cause comes on in regular course for trial before the court without a jury, and the court, after hearing the evidence and the arguments of counsel, * * finds the defendant guilty of unlawfully withholding from the plaintiff the possession of the premises * * and that the right to the possession of said premises is in the plaintiff. * * It is considered by the court that the plaintiff have judgment herein on the finding herein and that the plaintiff have and recover of and from the defendant possession of the premises, * * and that a writ of restitution issue therefor".

It is assigned for error that the court erred "in allowing plaintiff to amend claim after the close of plaintiff's case when full tender was made by defendant". If plaintiff amended her claim after the close of her case, she had a right to do so. (Sec. 46 Municipal Court Act.) With no bill of exceptions, statement of facts, or stenographic report of the proceedings in the transcript, we cannot tell what kind of written notice, if any, was served on defendant, whether a thirty days' notice to terminate a tenancy by the month, or a five days' notice after rent is due, or a ten days' notice to quit, or other notice. We must assume that the evidence introduced was sufficient to warrant the court in finding that the defendant was unlawfully withholding from the plaintiff the possession of the premises and that plaintiff had the right to possession, and in entering the judgment. For aught that appears to the contrary plaintiff's right to possession had become fixed before the

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tender of \$43 was made in open court, which right would be unaffected by reason of the tender and the refusal thereof. (Brownell v. Welch, 91 Ill. 523; Chadwick v. Parker, 44 Ill. 326; Leary v. Pattison, 86 Ill. 203; Thiry v. Edson, 129 Ill. App. 128; Strauss v. Fornaciari, 147 Ill. App. 18; Schumann Piano Co. v. Mark, 208 Ill. 282, 288.)

The judgment is affirmed.

AFFIRMED.

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October Term, 1911. No.

399 - 17937.

BERNARD McQUILLEN, et al.,
Appellees,
vs.
MATTEO MAZZONE,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

182 I.A. 133

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$960 rendered in the Circuit Court of Cook County in favor of Bernard Mcquillen and others, plaintiffs below, against Matteo Mazzone, defendant. The suit was for the recovery of money claimed to be due as rent for certain improved premises in the city of Chicago occupied by defendant. The case was tried before a jury who returned a verdict assessing plaintiffs' damages in the sum of \$960.

The action was originally in debt. Plaintiffs' amended declaration consisted of seven counts, to which declaration the defendant pleaded the general issue and several special pleas. Demurrers to the special pleas were sustained. On December 24, 1910, the defendant, by leave of court, filed a lengthy "additional" plea, consisting of ten pages, to all seven counts of said declaration. To this plea plaintiffs filed a general and special demurrer, assigning twenty-three causes of special demurrer. The court sustained the demurrer to this plea, to which ruling the defendant excepted and elected to stand by his plea. At the trial the plaintiffs relied upon the first and seventh counts of said declaration, having either dismissed or withdrawn the other counts, and the case was tried on said counts and defendant's plea of the general issue thereto. The verdict was rendered July 12, 1911, and the defendant, by his attorney, immediately moved for a new trial, which motion was set for hearing on July 15th. On the day set the defendant filed a written motion for a new trial, setting forth

1881 A. I. 881

THE COURT ORDERED DELIVERED THE ORDER OF THE COURT.

It is to be noted that a judgment of \$100 was entered in the Court of Cook County in favor of Edward McMillan and against Plaintiff's late, against which judgment, defendant's writ was for the recovery of money claimed to be due on said writ certain improved premises in the city of Chicago occupied by defendant. The case was tried before a jury who returned a verdict in favor of Plaintiff's damages in the sum of \$100.

The action was originally in 1881. Plaintiff's amended petition consisted of seven counts, to which defendant the defendant pleaded the general issue and several special pleas.

Counters to the special pleas were sustained. On December 31, 1881, the defendant, by leave of court, filed a lengthy "additional" plea, consisting of ten pages, to all seven counts of said decision. To this plea Plaintiff filed a general and special demurrer, assigning twenty-three causes of special demurrer. The court was

induced the answer to this plea, in which setting the defendant exposed and stated to stand by his plea. At the trial the Plaintiff relied upon the first and seventh counts of said decision, leaving other counts on which the other counts, and the case was tried on said counts and defendant's plea of the general issue. The verdict was rendered July 12, 1881, and the defendant, by his attorney, immediately moved for a new trial, which

motion was not heard on July 12th. On the day and the defendant filed a written motion for a new trial, setting forth

various grounds. On the same day the plaintiffs filed a written motion for leave to amend said first and seventh counts of their declaration, by changing the form of action from debt to assumpsit, and changing some of the allegations of said counts to conform to the change in the action and to conform to the proofs. On the same day - July 15th - a hearing was had on both motions, and the court entered an order giving leave to plaintiffs to change the form of action from debt to assumpsit and to file amendments to said counts "nunc pro tunc as of July 12th, 1911", and to amend the praecipe and summons and change the ad damnum, and further ordered that the "plea of general issue filed by the defendant, with notice of special defense, shall stand as the plea to the amended declaration filed nunc pro tunc as of July 12th, 1911". And thereupon defendant's motion for a new trial was argued and denied, and defendant's motion in arrest of judgment was also denied, and thereupon the judgment appealed from was entered.

The facts are substantially as follows: On May 1, 1906, a written lease of the premises was executed by Mary Cassidy, as lessor, and by defendant, as lessee, for the term from May 1, 1906 to April 30, 1908, to be occupied for a saloon and dwellings. The lessee covenanted to pay as rent the sum of \$20 per month in advance on the first day of each and every month during said term, it being admitted, however, that said lessee had paid the sum of \$100 as security on the last two months of the lease; that the lessee had received the premises in good order and repair and would keep the same in good repair at his own expense, and would not permit any alterations to be made except by the written consent of the lessor. It was agreed that the covenants should be binding upon and inure to the respective heirs, executors, administrators and assigns of the parties. The defendant took possession of the premises under the lease, and at the expiration of the term con-

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tinued to hold over, and was in possession at the time of the commencement of this action, February 11, 1910. Mary Casaidy, lessor, died in May 1906; Margaret Thomas, her only heir at law, died in November 1908; Andrew McGuire, the only heir at law of Margaret Thomas, died testate in December 1908, devising his estate to his widow and to the plaintiffs herein, who were his only heirs at law; and on May 31, 1909, said widow sold and conveyed to plaintiffs all her right, title and interest in the estate devised from said Andrew McGuire, including the premises in question. The defendant paid the rent reserved in the lease up to and including the monthly installment due for the month of November 1908. His last payment was made to said Margaret Thomas in November 1908, just prior to her death. John A. Stagg, an attorney at Chicago, obtained powers of attorney from the plaintiffs to collect the rents, and during the months of April and June, 1909, called on defendant and demanded payment of the rent then due, and that he surrender possession, but defendant refused. Another conversation was had in December, 1909, at which another demand for rent was made, but defendant again refused to pay. At this time there was some talk as to repairs on the premises. Plaintiffs claimed at the trial that there was due for rent the sum of \$960 - being fourteen months at \$80 per month, or \$1120, less the advance payment of \$160, mentioned in the lease.

It further appeared that on May 27, 1901, a mortgage on said premises had been executed to the Connecticut Mutual Life Insurance Company, as mortgagee, to secure a debt of \$4800, due five years after said date, with interest at 8% per annum; that said mortgage had been extended for a period of two years, to-wit, until May 27, 1903; that on January 11, 1909, the note and mortgage was assigned to the defendant; that on February 8, 1909, the defendant, by reason of the default in the payment of the principal

... to hold over, and was in possession of the firm of the
... of this action, February 11, 1910. Mary Kennedy,
... died in May 1907; Margaret Thomas, now only heir at law,
... died in November 1907; Andrew Kennedy, the only heir at law of
... Thomas, died January 1908, leaving his son
... to his widow and to the plaintiff's heirs, who were his only
... at law; and on May 21, 1909, said widow sold and conveyed
... all her right, title and interest in the estate de-
... from said Andrew Kennedy, including the premises in question.
... The defendant paid the rent reserved in the lease up to and in-
... the monthly installment due for the month of November 1908.
... his last payment was made to said Margaret Thomas in November 1907,
... just prior to her death. John A. Black, an attorney at Chicago,
... retained power of attorney from the plaintiff to collect the
... rent, and during the months of April and June, 1909, called on
... defendant and demanded payment of the rent then due, and that he
... defendant's possession, but defendant refused. Defendant's
... was not in default, but it was not until January 1910
... that defendant again refused to pay. At this time there was
... some talk as to repairs on the premises. Plaintiff claimed at
... the trial that there was due for rent the sum of \$200 - being
... two months' rent at \$100 per month, or \$100, less the advance pay-
... ment of \$100, mentioned in the lease.
... It further appeared that on May 27, 1910, a mortgage on
... said premises had been executed to the Commercial Union Life
... Insurance Company, as mortgagee, to secure a debt of \$1000, due
... five years after said date, with interest at 8 per annum; that
... said mortgage had been ordered for a period of two years, to-wit:
... until May 27, 1911; that on January 11, 1909, the note and mort-
... gage was assigned to the defendant; that on February 8, 1909, the
... defendant, by reason of the default in the payment of the principal

sum due, and the interest due on November 27, 1908, filed his bill in equity to foreclose said mortgage, making John F. Devine, as administrator of the estate of Mary Cassidy, deceased, and as administrator of the estate of Margaret Thomas, deceased, and others, parties defendant thereto; that on June 22, 1909, a decree of sale was entered, and that on August 12, 1909, a master in chancery sold the premises to the defendant and executed and delivered to him a certificate of sale.

It is contended that the court erred in sustaining the general and special demurrer of plaintiffs to the "additional" plea of defendant, filed December 24, 1910. We deem it unnecessary to discuss the lengthy arguments of the respective counsel in this particular. Suffice it to say that we are of the opinion that the demurrer was properly sustained.

It is also contended that the court erred in refusing to admit certain evidence. At the trial the defendant sought to introduce a certified copy of said master's certificate of sale of August 12, 1909 to defendant, for the purpose of showing that defendant was in possession of said premises on said date, and thereafter, under and by virtue of said certificate of sale, and therefore was not accountable for the rent reserved under the lease after said date. The court refused to allow the instrument to be introduced, and we think that this ruling was correct. A tenant in possession is estopped from denying the title of his landlord, and he must surrender up the possession before he can assail that title or set up title in himself. (Sexton v. Carley, 147 Ill. 259, 272; Doty v. Burdick, 83 Ill. 473, 477; Constant v. Barrett, 34 N. Y. Supp. 163.) The defendant in this case did not and would not surrender possession under the lease. Furthermore, the fact that defendant had received said certificate of sale did not entitle him to the possession of the premises, or to the rents, issues or

profits thereof, during the period of redemption. (Davis v. Dale, 150 Ill. 239; Schaeppi v. Bartholomae, 217 Ill. 105.) The defendant also sought to show the cost of certain repairs, which he claimed to have made on the premises subsequent to August 12, 1909, and also claimed were necessary to preserve the property, for the purpose of charging said cost against the rent sued for, but this evidence was not admitted. We think that this ruling was also correct, especially in view of the provisions of the lease that the defendant would keep the premises in good repair at his own expense and would not permit any alterations to be made except by the written consent of the lessor. No such consent by plaintiffs to the making of any repairs or alterations was shown.

Complaint is also made that the court refused to give to the jury certain instructions offered by the defendant. Under the facts in evidence in this case we do not think that the refusal to give these instructions constituted prejudicial error.

The judgment is affirmed.

AFFIRMED.

October Term, 1911. No.

441 - 17981.

JOHN DADIE, administrator of
the estate of THOMAS M. SMITH,
deceased,

Appellee,

vs.

CITY OF CHICAGO, et al.,
Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

182 I.A. 134

STATEMENT. This is an action on the case commenced in the Superior court of Cook county by John Dadie, administrator of the estate of Thomas Smith, deceased, to recover damages because of the death of Smith, occasioned by his falling from a wagon which he was driving along Elston avenue in the city of Chicago. The action was originally brought against the City of Chicago, Chicago Consolidated Traction Company and Chicago Railways Company, defendants. Subsequently the Chicago Electric Transit Company was made an additional party defendant, and subsequently the suit was discontinued as to the Chicago Railways Company. The case was tried before a jury, and on March 19, 1909, they returned a verdict finding the defendant, City of Chicago, guilty, and assessing plaintiff's damages at \$10,000, and finding the defendants, Chicago Consolidated Traction Company and Chicago Electric Transit Company, not guilty. The plaintiff immediately entered his motion for a new trial as to the defendants, Chicago Consolidated Traction Company and Chicago Electric Transit Company, and the City of Chicago also entered its motion for a new trial. On July 14, 1909, the court, by order entered of record, sustained plaintiff's motion and awarded him a new trial, and also sustained the motion of the City of Chicago and awarded it a new trial. On the same day the plaintiff entered his motion to set aside and vacate the order granting a new trial in said cause and the court ordered that said motion be continued for hearing and final disposition. On March 7, 1910, by agreement

of the parties made in open court, it was ordered that the cause be passed to be taken up on five days' notice. On June 24, 1911, after notice and on motion of plaintiff, it was ordered that all papers and proceedings in said cause be and are amended by discontinuing as to defendants, Chicago Consolidated Traction Company and Chicago Electric Transit Company; and it was further ordered that plaintiff's motion, entered July 14, 1909, to set aside and vacate the order granting the City of Chicago a new trial, be sustained, and said order was set aside and vacated, and the City of Chicago excepted; and thereupon the City of Chicago entered its motion in arrest of judgment, which motion was also denied and exceptions entered. Thereupon the court entered judgment in the sum of \$10,000 on said verdict, "also the further sum of \$1125, being the interest * * from the time of the rendering of the verdict herein to date, being the sum total of \$11,125, together with costs". The City of Chicago excepted to the entry of this judgment and subsequently perfected its appeal to this court.

The original declaration, filed April 24, 1908, consisted of one count, and averred that the defendants, City of Chicago and Chicago Consolidated Traction Company, "negligently permitted a certain hole to be and remain in Elston avenue, and on the west side thereof and near the crossing of said Elston avenue with Armitage avenue and close to the south-easterly bound track of the Chicago Consolidated Traction Company, of which facts the defendants had notice"; and further averred that on March 7, 1908, plaintiff's intestate in his life time was driving a team attached to a wagon in a south-easterly direction upon and along said Elston avenue, near the intersection of that avenue with Armitage avenue, and that, while he was so driving, and while in the exercise of due care for his own safety, and by reason of the negligence of the defendants, one of the wheels of said wagon unavoidably went

into said hole, thereby causing him to be thrown from said wagon, and permanently injuring him, from which injuries he shortly thereafter died. On February 10, 1909, plaintiff, by leave of court, filed an additional count, in which he averred that all four of the defendants "negligently permitted said Elston avenue, and on the west side thereof, and at and near the crossing of said Elston avenue with said Armitage avenue, and the crossing at and near the south-easterly bound track of the defendants, and within a space of 18 feet in the middle of said street, to be and remain out of repair, unsafe and dangerous, and permitted certain holes to be and remain in said Elston avenue and at the place aforesaid, all of which facts defendants had notice, or by the exercise of reasonable care should have had notice", and further averred that, while plaintiff's intestate was driving as aforesaid and was in the exercise of due care for his own safety, one of the wheels of the wagon unavoidably "went into said hole" thereby causing him to be thrown from said wagon, etc. To the original and additional counts the City of Chicago filed a plea of the general issue.

Some of the facts adduced from the testimony of the various witnesses at the trial are as follows: Elston avenue runs in a northwesterly and southeasterly direction. Armitage avenue runs east and west and crosses Elston avenue at an oblique angle. The Chicago Consolidated Traction Company operated a street car line, with double tracks, on Elston avenue. South bound cars ran on the west track and north bound cars on the east track. Elston avenue was paved with wooden blocks. About 180 feet north of the north line of Armitage avenue, there is a curve in Elston avenue, the street at that point turning more towards the northwest, and there is a corresponding curve in the street car tracks. On the southwest corner of the two streets was located Poehler's saloon, and south of this building was Poehler's grocery store, and on the

northwest corner of the streets Grawe's saloon was situated. Thomas E. Smith, plaintiff's intestate, was a driver, employed by W. J. Moxley Co., butterine manufacturers, for about ten years. On March 7, 1906, at about 8 o'clock in the evening he was driving a four-mule team, hitched to a large empty wagon, southward in Elston avenue, near Armitage avenue, the wagon wheels "tracking" in the south bound car tracks on the west side of Elston avenue. The wagon weighed about two tons; the wheels were equipped with four-inch steel tires; the box rested right on the axles without any springs under it, and the driver's seat was a spring seat about 1 1/2 feet from the ground. Plaintiff's intestate was the only person on the wagon and he was seated in the high spring seat. He either fell, or was thrown, from the wagon to the ground on Elston avenue, immediately south of the south line of Armitage avenue, and almost instantly killed. The team continued to go southward on Elston avenue and was stopped some distance away and brought back. Only one eye witness to the accident testified at the trial, although several witnesses testified to circumstances immediately following. The deceased was 43 years of age, married, and left him surviving a widow and six children, the oldest being 18 years and the youngest 7 years of age.

The eye witness referred to was Mary Becker, one of plaintiff's witnesses. She testified that she had been to Poehler's grocery store and, as that store was closed, she came out of the front door of Poehler's saloon on Elston avenue; that when she first came out of the door she saw the mules "coming up, going towards down town"; that they were north of her at that time, coming towards Armitage avenue; that the wagon was running on the car tracks; that the driver "was sitting on the seat. I saw him. He had the lines in his hands. He had gone past Armitage avenue. I was in front of the saloon door. He was still on the seat. * *

The mules were walking - trotting like"; that "just before he fell he was turning to the left (i.e. to the east) on to the next car track"; that there was a car coming up behind him; that the left front wheel of the wagon went down into a hole, and "he went head first out of the wagon. * * I saw him when he fell. He fell right under the wagon. He laid right in the middle of the car tracks"; that "I had seen the hole there before that. I cannot say how long before. I don't know how deep it was. The hole was muddy. The hole was right in front of Poehler's saloon door. * * The hole was inside the car track by the rail. * * I did not go over to where the hole was at any time"; that after the deceased fell "I just stood still", and some men "picked him up and put him on the sidewalk and he just lived one minute"; that the approaching street car did not strike the wagon.

Patrick J. Stack, a witness for plaintiff, testified that he was coming out of the side door on Elston avenue, of Waive's saloon, which saloon was on the northwest corner of Elston and Armitage avenues, and which door was about 20 feet north of the south end of said saloon, and he saw a wagon coming along with four mules at a slow trot; that when he first saw the wagon it was "just a little bit north of Armitage avenue; that he didn't see the driver on the seat; that as he (Stack) got on the south side of Armitage avenue he saw a man lying in the middle of the street, about "5 or 6 feet south of Armitage avenue", called for assistance and brought the man over and laid him on the sidewalk; that he "didn't see the accident"; that the point where he saw the man lying in the street was "about 70 feet south" of where he first saw the mules; that there was an electric light at the corner of Armitage and Elston avenues; that he "looked at the place of the accident on the next day", and that it was "in the same condition the next day as it was before". In response to the question as to

what that condition was, the witness replied: "There was a hole, I should judge about 100 feet, maybe a little over, 160 feet for all I know, north of Armitage avenue, 6 or 7 or maybe 10 inches deep, maybe 4 feet long, maybe 3 feet wide. There was nothing in the hole but mud and slush. It was full of water, and to my knowledge had been there five or six weeks before the day of the accident. I have noticed other wagons going down the hole". The witness further testified that he didn't see the wagon on which plaintiff's intestate was riding go into this hole, that plaintiff's witnesses, McCabe, Dadie and Griffis, were there the next day after the accident, that he pointed out the hole to McCabe, that Dadie and Griffis measured it, that he told Griffis that the man was picked up about 5 or 6 feet south of Armitage avenue, that he did not tell Griffis or anybody that the man was picked up at the hole north of Armitage avenue, that "the hole that we went over to see the next day was right at the curve of the car tracks", that the hole was "right alongside the track, * * to the west of the west rail of the track", that that hole was "the only hole I noticed there", and that up and down Elston avenue, "all the ways along", the pavement was "rough but no holes". The attorney for the City of Chicago moved that the testimony of the witness, Stack, "as to hole 100 to 160 feet north of Armitage avenue * * be stricken out as being a description of a place differing from the place where an eye witness saw the accident and there is no connection between them", but the court denied the motion and an exception was taken.

John Dadie, plaintiff and secretary and general manager of the W. J. Moxley Co., testified on direct examination that he did not know of his own knowledge where the accident occurred, but that in company with the witnesses, McCabe and Griffis, he went "to the point where the accident occurred". He was then asked by the court where that was, and he replied, over objection, "about 100 feet north

of Armitage avenue, north on Elston avenue". A motion to strike out this answer was denied, the court saying, "the place he located may stand", to which ruling counsel for the City excepted. The witness then stated "we examined the hole in the street". He was then asked, over objection, to describe that hole, and replied, "I found a hole in the street about 6 feet long, about 14 inches deep, varying in width from about 1 to 3 feet, right at the edge of the west track. It was filled with water". The witness further testified that this hole "was about 140 feet north of Armitage avenue in Elston avenue", that "he did not see any other", that "we looked up and down the street from that point, - - probably for a block or so", that at that point the street car tracks curved, and there was "a bend in the street, and this was just at the south end of the bend". Plaintiff's witness Griffie, who accompanied Dadie to Elston avenue on the morning after the accident, testified that "we went out and measured the hole where they claimed an accident had happened", and that the hole was about 180 feet north of the place "where the gentleman showed us he was picked up". His testimony as to the size of the hole was similar to Dadie's testimony. Plaintiff's witness McCabe, who also accompanied Dadie to Elston avenue, was also allowed to describe the hole, which he said was "about 180 or 140 feet north of Armitage avenue on Elston avenue on the west side of the car track and 180 feet from the south curbstone of Armitage avenue". Plaintiff's witness, Edward Poehler, was also allowed to describe the hole, which he located as being at "the curve" of the street. Plaintiff's witness, Arthur Poehler, who was the son of Edward Poehler and who worked for his father in the latter's saloon and grocery store at the time of the accident, was also allowed to describe the hole, which he said was "from 180 to 200 feet north from Armitage avenue", and which "was on the west side of the south bound track, right alongside the rail", and where the tracks curve,

and which had been there "from five to six weeks". He further testified on cross-examination that he "picked the deceased up and put him on the sidewalk", that the point where he picked him up was "in the centre of the two tracks, about 25 feet south of Armitage avenue". He was asked to state, if he knew, what was the condition of Elston avenue, with reference to the west side of that street being smooth or rough and with reference to there being holes in the pavement, from about 25 or 30 feet south of Armitage avenue and thence north about 100 or 150 feet, and he replied that "it was 'nt smooth nor it wasn't so rough either", and that there were no holes in that part of the street, so far as he could judge. Plaintiff's witness, Fred Grawe, the proprietor of the saloon on the northwest corner of the two streets, testified that he was in his saloon, waiting on a customer, the witness Stack, and he "saw Moxley's big wagon with four mules going by", that "when the wagon got to the opposite (south) side of Armitage avenue I seen an object under the wagon and this object was this man, Smith", and that he did not go over to the place. He also was allowed to testify as to the condition and size of the hole north of Armitage avenue. He further testified that he was familiar with the condition of Elston avenue for about 100 feet north of Armitage avenue, and that "along the rail it was rough, but fairly well, except one hold about 120 or 125 feet back from the corner".

At the conclusion of plaintiff's evidence the attorney for the City of Chicago, renewed his motion, several times previously made, to exclude all evidence as to "the condition of the hole north of Armitage avenue, because there has been no connection made", stating that the only eye witness, Miss Becker, had described just the place where the accident happened, south of Armitage avenue, and that "all the description of a hole north of Armitage has nothing to do with it, and they have not connected it up", The court

and which had been there "from time to time". The Committee
testified on cross-examination that he "knew the defendant in the
past and in the present", and that the latter was "not a
man" in the sense of the law, and that he "was not a
person". He was asked to state, if he knew, what was the
condition of the defendant, with reference to the past and to the
present, being asked to state and with reference to the past being
asked to state, from about 1910 or 1911 until the death of the
defendant and himself about 1910 or 1911, and he testified that
"it was not known to me that he was a person", and that there
was no basis in that part of the record, as far as he could judge.
The defendant's witness, John Jones, the proprietor of the saloon on
the southeast corner of the lot above, testified that he was in
the saloon, sitting on a bench, the witness above, and that
"he saw the woman with him and that he saw her". When the woman
was in the saloon (about) with the defendant, I saw an object
which the woman and this object was with her, and that in
this case he went to the place. He also was asked to testify as
to the condition and state of the lot of the defendant. He
testified that he was familiar with the condition of the lot
above the lot about 1910 north of the lot above, and that "about
the fall of 1910, about 1910, about 1910, about 1910, about 1910
on the lot above the lot above".

At the deposition of the defendant's witness, the attorney
for the City of Chicago, through his witness, several times previous
to this, he examined all evidence as to the condition of the lot
above of the defendant, because there has been no examination made,
stating that the only one who was present, and described that
the place where the defendant resided, about 1910, was not
and that "all the description of a lot north of the lot above has no
thing to do with it, and that they were connected to it". The court

said, "I think it would be a question whether or not it was the same hole, and the motion will be overruled", to which ruling an exception was taken.

The court was asked to instruct the jury to find the City of Chicago not guilty, but the motion was refused. Several witnesses for the City testified as to the condition of Elston avenue. Albert Brown testified that immediately after the accident he stopped the mules and brought the team back to the corner of the two streets, where a crowd had gathered; that on the day of the accident and prior thereto he knew the condition of the west side of Elston avenue near Armitage avenue, and that outside of the track from about 6 inches up from the rail it was "a little rough", but right alongside of the rail there were 3 or 4 places where there were holes, "like as if a wagon had dropped off the rail and made a rut there"; that there were several such places "right opposite Armitage on Elston". James Burke, ward superintendent, testified that the west side of Elston avenue, from 25 feet south of Armitage avenue to a point 200 feet north of Armitage, "was rough", but that between the curb and within six inches of the street car track there were no holes; that close to the track there were some depressions, but that he did not know how long these had existed.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Inasmuch as we have reached the conclusion, after a careful examination of the record, that the judgment in this case should be reversed and the cause remanded for a new trial, we deem it unnecessary to discuss many of the points argued by counsel.

The main contention of counsel for the City is, that the trial court committed error, prejudicial to the City, in admitting over objection, and in refusing to strike out, the testimony of

... it would be a question whether or not it was the
... and the motion will be considered, in which motion an
...
... The court has asked to postpone the day to the 15th
... and Friday, but the motion was refused. Several other
... the day decided on for the session on March 20th.
... that immediately after the session on
... the case and through the case that is the history of the
... where a record had gathered; then on the day of the
... and after that he was the condition of the case was
... and that motion was refused. The court said that
... from about 2 inches up from the wall is a "little patch",
... of the wall there were 2 or 3 places where there
... "like as if a person had stepped off the wall and said
... that there were several such places "right opposite
... "from there" were suspended, installed
... the west side of Alameda Avenue, from the west corner of building
... on a point the feet north of building, "was hanging", but that
... and within the inches of the ground can be seen quite
... that close to the front there was some suspension,
... that was not there but that there had existed.

... the court said that the motion was refused.

... as we have reached the conclusion, after a care-
... of the record, that the judgment in this case
... and the court rendered for a new trial, so
... is necessary to discuss any of the points argued by coun-

... the main contention of counsel for the city is, that the
... committed error, prejudicial to the city, in admitting
... and in refusing to strike out the testimony of

plaintiff's witnesses, regarding the hole in Elston avenue, which was about 150 feet north of the north line of Armitage avenue and still further away from the place where the only eye witness to the accident testified that the accident occurred. In the light of all the evidence in this case we agree with the contention. While in some cases proof of the general condition of a street or sidewalk near the place where the accident occurred is admissible as tending to establish notice to the City, (Taylorville v. Stafford, 196 Ill. 288, 290; City of Elgin v. Hofs, 200 Ill. 252; Same 212 Ill. 20, 24) still notice to the City "of one particular defect which caused an injury cannot be established by proof of notice of another particular defect which is in no way related to the former and did not contribute to the injury". (28 Cyc. 1400). In our opinion, under the evidence, the hole about 150 feet north of Armitage avenue, which was described by said witnesses, in no way contributed to the injury of plaintiff's intestate, and in allowing to remain in the record the testimony of said witnesses, as to size of that hole and the length of time it had been there, the court erred.

And we do not think that the evidence sufficiently proved that the City had notice of the existence of the hole, if any, south of Armitage avenue, concerning which plaintiff's witness, Miss Becker, testified, or of the dangerous condition, if it was dangerous, of Elston avenue, immediately south of Armitage avenue. (City of Chicago v. Murphy, 84 Ill. 224; Boender v. City of Harvey, 251 Ill. 228).

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

October Term, 1911. No.

466 - 18,005.

HATTIE M. BALSLEY,
Appellee,
vs.
JOHN HEITZEL,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

182 I.A. 136

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$2,500, rendered in the Superior court of Cook county on July 1, 1911, in favor of appellee, hereinafter called plaintiff, and against appellant, hereinafter called defendant, in an action for damages for personal injuries. The suit was originally brought against defendant and the Chicago Railways Company, hereinafter called the Company. In the first count of her declaration plaintiff averred that on April 21, 1909, she was at and near the intersection of Clark and Wellington streets in the city of Chicago, and, for the purpose of becoming a passenger, she signalled one of the Company's south bound street cars on Clark street to stop; that she was in the exercise of ordinary care for her own safety; that the Company so negligently managed and propelled said street car in a southerly direction along and over said Clark street, and the defendant so negligently managed and drove a horse and wagon, owned by him, in a southerly direction over said street, at the place aforesaid, that, by reason of the negligence of the defendant and the Company, a collision occurred between said wagon and said car; that as a result thereof the "wagon was knocked, forced and thrown toward the curb and sidewalk of said Clark street", and upon the place where plaintiff was standing, and thereby a collision occurred between plaintiff and said horse and wagon, whereby plaintiff sustained severe and permanent injuries. The second count charged that, as a result of the collision between

411 - 27,000.

George W. Williams,
Appellee,
vs.
The Chicago & North Western
Transportation Company,
Appellant.

APPEAL FROM

SUPREME COURT

OF THE STATE OF MINNESOTA.

1821 A. 138

W. LUTHER BROWN, ATTORNEY FOR THE APPEAL, AND GEORGE W. WILLIAMS, ATTORNEY FOR THE APPELEE.

This is an appeal from a judgment for \$2,000, rendered in the Supreme Court of such county on July 1, 1911, in favor of appellant, respondent-George W. Williams, and against appellee, respondent-The Chicago & North Western Transportation Company, hereinafter called the Company. The suit was originally brought against defendant in an action for damages for personal injuries. In the first count of her declaration plaintiff averred that on April 21, 1909, she was at and near the intersection of Clark and Wellington streets in the city of Chicago, and, for the purpose of becoming a passenger, she signalled one of the Company's south-bound street cars on Clark street to stop; that she was in the exercise of ordinary care for her own safety; that the Company's negligently managed and controlled said street car in a hazardous manner about and over said Clark street, and the defendant negligently managed and drove a horse and wagon, west of said street, in a hazardous manner over said street, at the intersection of which street the negligence of the defendant and the Company, a collision occurred between said wagon and said car, that as a result thereof the wagon was knocked, turned and thrown toward the curb and sidewalk of said Clark street, and from the place where plaintiff was standing, and thereby a collision occurred between plaintiff and said horse and wagon, whereby plaintiff sustained serious and permanent injuries. The record would appear that, as a result of the collision between

the horse and wagon and the street car, "the direction in which said horse and wagon was then and there moving was suddenly changed and diverted from the road bed of Clark street toward the curb and sidewalk of Clark street", and upon the place where plaintiff was standing, and thereby a collision occurred between plaintiff and said horse and wagon, etc. To this declaration the defendant filed a plea of the general issue, and the Company filed a like plea, together with a special plea denying ownership or control, at the time and place, of the street railway or car. Shortly before the trial, on motion of plaintiff, it was ordered that all papers and proceedings be and are amended by discontinuing as to the Chicago Railways Company, and the case went to trial before a jury with John Hetzel as sole defendant.

At the trial 14 witnesses, including plaintiff, testified in her behalf, and 8 witnesses, including the driver of the wagon, testified for the defendant. Photographs, plats, certain writings, etc., were also introduced in evidence. The testimony was quite conflicting. Plaintiff, a woman about 40 years of age, testified that on the evening of April 21, 1909, about six o'clock, she left her place of employment and went to the south-west corner of Clark and Wellington streets for the purpose of boarding a south bound street car on Clark street; that she saw a car coming and signalled it to stop and it began slacking up; that she also saw a "Carson, Pirie, Scott" wagon coming south which stopped; that then she saw another wagon (defendant's wagon) back of the street car and "the horse was running very fast" and she turned to go back onto the sidewalk and was struck on the sidewalk; that as a result she was confined to her bed for about five weeks and suffered much pain, mostly in her back, and was permanently injured. The driver of the "Carson, Pirie, Scott" wagon testified that he was driving south on Clark street; that the street car passed him about the north

[illegible]

side of Wellington street, and went on and stopped at the further crossing; that he saw two ladies standing in position to board the car, between the car tracks and the sidewalk; that defendant's wagon, "going a pretty good gait", came from the north; that the two ladies ran back towards the sidewalk and were knocked down on the sidewalk; that he saw the "horse trample on one of the ladies", whether on the breast or back he could not say, and that he, the driver of the "Carson, Pirie, Scott" wagon, "pulled out onto Wellington street, facing southwest from Clark street". The theory of the plaintiff was that the car was standing still or slowly moving, with its rear end just south of the south line of Wellington street; that the driver of defendant's wagon had been following the car, the wagon moving south wholly or partly in the south bound track; that after the car had about stopped at the crossing the horse and wagon kept on rapidly moving and turned out from the track behind the car, and in some manner the left hind wheel of the wagon collided with the rear step of the car, causing the wagon to tilt and the horse to swing to the west and to run upon the sidewalk, striking plaintiff. There was evidence to support this theory. The theory of the defendant, as principally supported by the testimony of the driver of the wagon, was that the horse and wagon were being driven south in Clark street just west of the car tracks; that when Wellington street was reached the "Carson, Pirie, Scott" wagon was opposite defendant's wagon and to the west of it, which prevented defendant's wagon from moving more to the west; that a south bound car approached the wagon from the rear at such a high rate of speed as indicated that it would not stop at the crossing on the south side of Wellington street; that in passing the wagon the front end of the rear step of the car (which step projected several inches beyond the west side of the car) caught

the left rear wheel of the wagon, and threw the horse and wagon toward the curb and sidewalk and upon plaintiff. The driver of defendant's horse and wagon testified that he was moving south on the west side of Clark street, "about three feet from the street car track, perhaps a little more"; that as he was crossing Wellington street the "Carson, Pirie, Scott" wagon was almost opposite him; that the street car passed him "almost on the crossing, just a couple of feet away, and it was going almost full speed", and went "fifty or sixty feet from the corner before it stopped"; that as the car went by him "the women were standing on the crossing and I signalled for them to step back, and when I seen they didn't go I stopped and the hind step on the right side of the car struck the left rear wheel of my wagon, and the wagon and horse was knocked up on to the sidewalk from the jar, and against one of the women. * * When I picked the lady up she was lying on the sidewalk and the horse was over her".

After careful consideration we are of the opinion that the verdict is amply supported by the evidence. Counsel for defendant do not urge that the damages awarded are excessive. The only points argued are that the court erred in giving one instruction offered by plaintiff, in refusing to give two instructions offered by defendant, and in certain rulings on evidence.

We do not think that the giving of instruction No. 6 offered by plaintiff constitutes error. Practically the same instruction has been approved in the cases of North Chicago Street R. Co. v. Kaspers, 193 Ill. 246-50, and Same v. Wellner, 206 Ill. 272-4.

Nor do we think that, under the evidence in this case, that the court erred in refusing to give instructions numbered 4 and 6 offered by defendant. (Purington Brick Co. v. Bokman,

The left rear wheel of the motor, and threw the handle and return
 toward the left and slightly and upon plainity. The driver of
 defendant's motor was again testified that he was saying enough
 as the same time of time almost, "about three feet from the
 street and back, perhaps a little more"; that as he was moving
 for defendant's motor for "forward, back, back" again was almost
 opposite him; that the street car passed him "almost on the
 sidewalk, just a couple of feet away, and it was going almost
 full speed", and went "right on about three feet from the motor before
 it stopped"; that as the car went by him "the woman was stand-
 ing on the sidewalk and I signalled for her to stop back, and
 when I saw that didn't go I stopped and the third step on the
 front side of her car about the left rear wheel of my motor,
 and the woman and motor was backed up on to the sidewalk from
 the left, and against one of the women, a woman I picked the
 left up she was lying on the sidewalk and the motor was over
 her.

After careful consideration we are of the opinion that
 the evidence is fully supported by the evidence, General for
 defendant to not urge that the damages awarded are excessive.
 The only points argued are that the court erred in finding one
 defendant liable by negligence, in refusing to give two instru-
 ctions offered by defendant, and on certain rulings on evidence.
 We do not think that the giving of instruction No. 1
 offered by plaintiff constituted error. Obviously the same in-
 struction has been approved in the cases of North Chicago Street
Car Co. v. People, 100 Ill. 402-03, and Ham v. Railway, 100 Ill.

475-4.

Now as we think that, under the evidence in this case,
 that the court erred in refusing to give instructions numbered
 1 and 2 offered by defendant. (Forfeited Bill No. 7-100000.)

102 Ill. App. 186; North Chicago Electric R. Co. v. Penser, 190 Ill. 87; Chicago West Division Ry. Co. v. Bert, 83 Ill. 528.) Furthermore, we think that the jury were fully and sufficiently instructed as to the law applicable to the case by other given instructions.

It appeared that about a year before the trial the plaintiff signed and sealed an instrument, dated July 8, 1910, (which was introduced in evidence) whereby, in consideration of \$200 paid to her by the Receivers of the Chicago Railways Company, she covenanted and agreed that she would "not at any time bring, or cause to be brought any action at law against said Receivers or the said Company, for or on account of a certain accident which occurred on or about April 21, 1909, at or near the intersection of Wellington and Clark streets". Counsel for defendant claimed at the trial that the defendant was not bound by the particular wording of the above covenant not to sue, and that the defendant had the right to show, if he could, that the actual agreement and understanding between plaintiff and the Railways Company was that, in consideration of the \$200, she was to abandon and release all her claims against the Railways Company. To this end, when plaintiff was being cross-examined as a witness several questions were asked her relative to said payment of \$200, some of which the trial court allowed her to answer. Two questions, however, she was not allowed to answer and the claim is made that these rulings constitute error. She was asked if she "didn't settle with the railway company", to which she replied, "No, I didn't settle. I got some money but I didn't settle. I got \$200. * * I made no settlement". The following then occurred:

"Q. After you got the \$200 from the railroad company, you did not have any other claim against the railroad company, did you?

A. I don't know.

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Q. Is there anything about that transaction with the railroad company that you don't want to tell?

A. No, there is nothing.

Q. Didn't you sign a release, or some paper, to the railroad company?

A. I did not sign any release. I signed a paper at the time I got the \$200.

Q. At the time you signed that paper and got the \$200, didn't you understand that you had no further claim against the railroad company?

Mr. Johnson. I object to that as having been answered. (Objection sustained and exception).

Q. Didn't Mr. Johnson tell you that you had no further claim against the railroad company? (Objected to; sustained and exception).

Q. That \$200 you got was on account of this accident was it not?

A. In regards to it."

We do not think that the court erred in sustaining the objections to the two questions above mentioned. It is of these rulings that counsel complain. The record shows that the court allowed counsel a large latitude in questioning the witness as regards the transaction with the railroad company. And we cannot say that under the evidence a release to the railroad company or an accord and satisfaction with it was proved. One of the instructions offered by the defendant, and given, told the jury that if they should find from the evidence that both the railroad company and defendant were at fault in causing the accident, and that after the beginning of the suit the plaintiff received \$200 from the railroad company, and that the said sum was given the plaintiff by the railroad company and accepted by her in full satisfaction and discharge of all claims by her against the railroad company, then their verdict must be not guilty. The question, therefore, whether or not the \$200 received by plaintiff was received by her in satisfaction of all claims against the railroad company for the

injuries sustained was submitted to the jury, and we think under the evidence properly so, (City of Chicago v. Babcock, 143 Ill. 338-36; Jenks v. Surr, 56 Ill. 450) and it is evident from their verdict that they did not think that the money was received in such satisfaction, and we are not disposed to disturb the verdict.

"Where there are a number of tortfeasors, the party injured may, at his election, sue one, or several, or all; and where the suit is against one or some of the wrong doers, but not against all, the person or persons sued have no right to complain. And so, also, where there is a suit against several tortfeasors, the dismissal of the suit against one does not bar the action against the others". (City of Chicago v. Babcock, *supra*.) And while it is the law that "a release to one of several joint tortfeasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others"; (City of Chicago, v. Babcock, *supra*; Wallner v. Chicago Traction Co., 245 Ill. 148) it is also the law that "the legal effect of a covenant not to sue is not the same as that of a release. A covenant not to sue a sole tortfeasor is, to avoid circuitry of action, considered in law a discharge, and a bar to an action against such tortfeasor. But the rule is otherwise where there are two or more tortfeasors, and the covenant is with one of them not to sue him. In such case the covenant does not operate as a release of either the covenantor or the other tortfeasors, but the former must resort to his suit for breach of the covenant, and the latter can not invoke the covenant as a bar to the action against them". (City of Chicago v. Babcock, *supra*; West Chicago St. R. Co. v. Piper, 165 Ill. 325-27).

And we do not think in the other rulings of the trial court on evidence, complained of by counsel, that prejudicial error was committed. The judgment will accordingly be affirmed.

AFFIRMED.

March 7, 1911.
254 - 18,293.

A. B. BROOKS,
Defendant in Error,

vs.

VINEGAR BEND LUMBER COM-
PANY, a Corporation,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

182 I.A. 145

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, defendant below, a corporation with principal office at Vinegar Bend, Alabama, seeks by this writ of error to reverse a judgment for \$220, rendered against it in the Municipal Court of Chicago in favor of defendant in error, plaintiff below. The action was one of the fourth class and was tried before the court without a jury. Plaintiff was a salesman of lumber on commission, with office in Chicago, Illinois, and brought suit to recover commissions claimed to be due him from defendant, arising from the sale and delivery of certain lumber to the Bahamas Timber Company, of Amstills, Cuba.

The testimony of the various witnesses is very conflicting on material points, but the facts, as we glean them from the record, are substantially as follows: In September, 1910, Willis H. Gilbert, agent in Chicago for the Bahamas Co., sent to various parties, for the purpose of obtaining bids, duplicate copies of a schedule of about 440,000 feet of lumber, "long leaf yellow pine, square edge", of various sizes, which lumber that company desired to purchase. One of these copies was sent to the plaintiff. On September 14th, the plaintiff enclosed the schedule in a letter addressed to defendant at Vinegar Bend, Alabama, saying: "Please name your lowest prices on attached Cuban schedule, F.O.B. vessel-side. Kindly state quickest time you can make complete shipment". On September 18th, the defendant, by M. E. Turner, president of

defendant, replied by letter acknowledging receipt of the schedule and saying: "We will give you prices on this schedule by next mail and we hope to be favored with your order". On the same day the defendant, by Turner, president, again wrote plaintiff: "Since writing you this A.M. we are able to quote you on your schedule of about 440 M. ft. a price of \$16 free alongside vessel at M. & O. Docks, Mobile Ala. * * The price we have named you is a very close one. * * The quality of the lumber is square edge and sound, such as is exported to Cuba and other West India Islands". Shortly after writing these letters Turner came to Chicago and first met plaintiff either at the Great Northern Hotel or at plaintiff's office. Turner was introduced to plaintiff by a man named J. E. Joice. Plaintiff testified that he told Turner that he desired to get a bid on said schedule, that he would arrange for a meeting between Turner and the party wanting the lumber, that he was handling the matter on a commission basis of 50 cents a thousand and would want the bid to include his commission, and that Turner replied that that would be satisfactory and that he would so arrange it. Joice, who was present at this conversation, corroborated plaintiff as to what was said regarding plaintiff's commission. Turner denied that at this conversation, or at any other time, he agreed to pay plaintiff any commission. On the following day plaintiff, Turner and Gilbert met at Gilbert's office, where a second conversation was had. Plaintiff testified that he introduced Gilbert as the representative of the Bahamas Company to Turner; that the schedule was again showed Turner; that Gilbert stated to Turner the quality of lumber which his company wanted; that Turner replied that the defendant made a "specialty of that kind of stock" and "wanted orders for it"; that Turner quoted to Gilbert a price on the lumber, and then left, saying he desired to send a wire to his mill and that

...replied by letter acknowledging receipt of the above-
...and saying: "We will give you papers on this matter by
...next mail and we hope to be favored with your order". On the
...same day the respondent, by counsel, produced, again under oath,
...a letter advising you this A.M. we are able to quote you as
...saying: "I am unable to state the date of the two telephone
...conversations at 42-44 West 12th St. The police we have advised
...you is a very close one. The quality of the number is quite
...high and unusual, much as is reported to have been used by
...Isabella". Shortly after writing these letters Turner came to
...Isabella and after not finding it easier at the usual telephone booth
...he at Isabella's office. Turner was informed by Isabella that
...a man named J. J. Jones. Isabella testified that he told Turner
...that he desired to get a job on said matter, that he would en-
...gage for a meeting between Turner and the party making the in-
...quiry, that he was handling the matter in a confidential way at
...the time a telephone call would come to him to inform him of
...the same, and that Turner replied that that would be satisfactory
...and that he would be waiting at 42-44 West 12th St. and present at 42-
...44 West 12th St. Isabella testified that she was with Turner
...at Isabella's office. Turner stated that at this conversation
...he at any time, he agreed to pay Isabella any amount.
...on the following day Isabella, Turner and Isabella met at 42-
...44 West 12th St., where a second conversation was had. Isabella
...testified that he introduced Isabella to the representative of
...the telephone company at Turner's. That the telephone was again shown
...to Turner, that Isabella stated to Turner the quality of Isabella
...which the company wanted; that Turner replied that the telephone
...was a "reproduction of that kind of sound" and "wanted Isabella to
...10"; that Turner desired to exhibit a picture on the Isabella and
...then left, saying he desired to send a wire to his wife and that

he would call on plaintiff later in the day, but that Turner did not thereafter call on plaintiff. Turner testified that the defendant had been selling lumber to the Bahamas Co. for several years; that when he went over to Gilbert's office with plaintiff he had never before met Gilbert and that at that conversation he learned for the first time that it was the Bahamas Co. that wanted the lumber mentioned in the schedule; that he thereupon told plaintiff and Gilbert that he could not then take the order for the reason that probably the Bahamas Co. had asked the defendant direct to figure on the same schedule, and that before doing so he desired to telegraph his mill and ascertain if defendant had received the same schedule direct and acted upon it. Turner says that he sent such a telegram, but it does not appear what reply, if any, was received by him. Turner's testimony is corroborated by that of Gilbert to the extent that at this conversation Turner first learned that it was the Bahamas Co. that wanted the lumber mentioned in the schedule, and that Turner would go no further in the matter until he had telegraphed his mill. Gilbert further testified that he had no further dealings with plaintiff and did not again see Turner, but that subsequent to this conversation the Bahamas Co. received "the lumber mentioned in that schedule" from the defendant. Turner, while denying that the defendant had shipped to the Bahamas Co. the lumber "mentioned in the schedule", admitted that subsequent to the conversation the defendant shipped to the Bahamas Co. "yellow pine lumber * * 300,000 feet or so".

On September 23rd, plaintiff wrote defendant at Vinegar Bend, Alabama, expressing regret that he did not see Turner again before the latter left Chicago and saying that if defendant secured the order he would expect defendant to "protect" him on his commission, and that he "had figured 35 cents each way

[illegible]

on this bill which would amount to 50 cents per thousand". On September 26th defendant, by Turner, president, replied that it would not allow plaintiff any commission, giving as a reason that "this order came directly from Cuba to us and was closed the same way", but further saying, "we feel that in the future if you get any business through Mr. Gilbert, we will be very willing to allow you a commission of 25 cents".

The witness Joice, who was present at the first conversation between Turner and plaintiff in Chicago, further testified that about 80 days thereafter he met Turner in Mobile, Alabama, and "asked him where his Mobile office was, and he said 'I haven't got any'; and I said, 'You told Mr. Brooke you had a Mobile office'; he said, 'Well, I did that to skin him on his commission'." Turner denied making any such statement.

The trial court in its finding assessed plaintiff's damages at the sum of \$230, which is in effect allowing plaintiff a commission of 50 cents per one thousand feet of lumber on 460,000 feet, which is the number of feet that Turner in his letter of September 16th said was contained in the schedule forwarded to defendant by plaintiff, and we are not disposed to disturb that finding. We cannot agree with the contentions of counsel for defendant that the finding and judgment are contrary to the evidence and contrary to the law.

It is also urged that plaintiff failed to prove his claim as alleged in his statement of claim. While it may be true that the cause of action as proved was not accurately set forth in plaintiff's statement of claim, we do not think that the defendant was prejudiced thereby or that for that reason the judgment should be reversed. (McDowell v. Sharp, 137 Ill. App. 145.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

267 - 16307.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

182 I.A. 146

It appears from the evidence that the parties to this suit are sister and brother; that defendant was the administrator of the estate of Sarah Breckman, deceased, mother of said parties and of Ollie Woollett, sister, and of Henry Breckman and Charles Breckman, brothers of said parties; that in May, 1910, the defendant wrote to his brothers and sisters that he was anxious to make distribution or to sell certain mortgages in his hands as such administrator and suggesting a meeting of all the heirs of Sarah Breckman, deceased, and that said mortgages might be distributed "as they are and by some of us paying each other the difference in cash"; that in June, 1910, all of said heirs met and agreed upon a distribution of the mortgages among themselves, and defendant then wrote out a memorandum of the agreement, and the mortgages were subsequently distributed by the defendant, as administrator, in accordance therewith. A portion of said memorandum was: "Chas. takes \$1000 mortgage, pays \$140 to Sadie and \$80 to Ollie. Ollie takes \$700 mortgage, gets \$80 from Chas. and \$120 from Fred. Sadie takes \$700 mortgage, gets

\$140 from Chas." Charles Breckman at this time was a helpless invalid, afflicted with locomotor ataxia and was in the care of plaintiff at her home, and, according to the testimony of plaintiff and Ollie Woollett, it was verbally agreed between defendant, Charles Breckman, plaintiff and Ollie, that Charles should give the \$1000 mortgage to defendant for the purpose of having defendant sell the same, that out of the proceeds defendant promised to pay plaintiff the sum of \$140 and pay Ollie the sum of \$20, and that the mortgage was delivered to defendant with that understanding. The defendant admitted that the mortgage was delivered to him for the purpose of making a sale thereof, that Charles agreed to allow defendant 10 per cent. of the face of the mortgage, or \$100, for negotiating the sale, and that he sold the mortgage in September, 1910, about three months after its delivery to him. It further appears that shortly after the meeting of the heirs Charles was taken to a hospital, where he remained about two months and then was brought back to plaintiff's house, where he died in October, 1910, and defendant was appointed administrator of his estate. Defendant testified that at the time the \$1000 mortgage was delivered to him he agreed to pay plaintiff and Ollie \$140 and \$20 respectively, out of the net proceeds realized from the sale of the mortgage, only if Charles "should happen to die" before the mortgage was sold; that after he had received the money realized from the sale he paid various bills of the hospital and other bills against Charles, and turned over the net balance to Charles, personally, before his death, and that it was arranged that Charles should pay plaintiff and Ollie. This testimony of the defendant is not supported. Plaintiff testified that she never received any part of the \$140 coming to her out of the proceeds of the sale of said mortgage from anyone, and it appears from the testimony of the defendant that

and from which, Charles Newman at this time was a helpless
 female, afflicted with lameness, and was in the care of
 plaintiff at her home, and, according to the testimony of plain-
 tiff and this witness, it was verbally agreed between defendant,
 Charles Newman, plaintiff and wife, that Charles should give
 the same mortgage to defendant for the purpose of having defendant
 and all the same, that out of the proceeds defendant proposed
 to pay plaintiff the sum of \$100 and pay wife the sum of \$50,
 and that the mortgage was delivered to defendant with that under-
 standing. The defendant admitted that the mortgage was delivered
 to him for the purpose of selling a new house, that Charles
 never so allow defendant in her care, of the sum of the mortgage,
 to him, for negotiating the sale, and that he sold the mortgage
 to defendant, that, about three months after the delivery to him,
 it further appears that shortly after the receipt of the same,
 Charles was taken to a hospital, where he remained about two
 months and then he returned home to plaintiff's home, where he
 died on January, 1885, and defendant was appointed administratrix
 of his estate. Defendant testified that at the time the same
 mortgage was delivered to him he agreed to pay plaintiff and
 wife \$100 and her respectively, out of the net proceeds realized
 from the sale of the mortgage, and it further appears to
 him, before the mortgage was sold; that after he had received
 the money realized from the sale he paid various bills of the
 hospital and other bills against Charles, and turned over the
 net balance to Charles, personally, before his death, and that
 it was through that Charles should pay plaintiff and wife.
 The testimony of the witnesses is not supported. Plaintiff
 testified that the money realized was part of the \$100 being
 to pay out of the proceeds of the sale of said mortgage two
 hundred, and it appears from the testimony of the defendant that

he paid Ollie the \$20 coming to her out of said proceeds, and it further appears from the testimony of plaintiff and Ollie, that after the death of Charles, the defendant (at a meeting at which defendant, Ollie, plaintiff, and plaintiff's attorney were present) was asked when he intended to pay plaintiff the \$140, and he replied that "he didn't have it just then, but would send a check for it the following week".

Two points are argued by counsel for defendant. They contend (1) that plaintiff did not prove her case by a preponderance of the evidence, and (2) that the promise sued on is a special promise to answer for the debt of another, is not in writing and is, therefore, within the statute of frauds. We are of the opinion that the finding and judgment are fully supported by the evidence, and that the verbal agreement of the defendant, to sell the \$1000 mortgage and out of the proceeds to pay \$140 to plaintiff and \$20 to Ollie, was in the nature of an original undertaking and not within the statute of frauds. (Wilson v. Bevans, 58 Ill. 232, 234; Prather v. Vineyard, 7 Ill. 40, 42; Walden v. Karr, 38 Ill. 49; Buehle v. Montelius, 148 Ill. App. 412, 420.) The judgment of the Superior Court is, accordingly, affirmed.

AFFIRMED.

to pay this the 2nd coming to pay out of said proceeds, and
it further appears from the testimony of Plaintiff and others,
that after the death of Charles, the defendant let a meeting
at which defendant, Alice Plaintiff, and Plaintiff's attorney
were present) and asked when he intended to pay Plaintiff the
fund, and he replied that "he didn't have it just then, but
would send a check for it the following week".

The points are argued by counsel for defendant. They
submitted (1) that Plaintiff is not bound by a promissory
note of the evidence, and (2) that the promise made to in a
separate promise to answer for the debt of another, is not in
writing and is therefore, within the statute of frauds, is
void of the claim that the promise was binding and that it was
made by the evidence, and that the verbal agreement of the
defendant, to sell the fund was made out of the proceeds
of the sale to Plaintiff and for the use of the money of
the estate of Charles and was within the statute of frauds.
Plaintiff v. Defendant, 111-112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

March Term, 1912, No.
307 - 18,347.

JOSEPH J. GREALISH,
Appellee,

vs.

SYKES STEEL ROOFING
COMPANY, a Corporation,
Appellant.

)
)
) APPEAL FROM

)
) SUPERIOR COURT

)
) COOK COUNTY.

182 I.A. 159

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for personal injuries sustained by Joseph J. Grealish, plaintiff below, while in the employ of Sykes Steel Roofing Company, a corporation, defendant below, occasioned by his falling from a ledge, projecting from the side of a building, about twenty-five feet above the ground. The jury returned a verdict in favor of plaintiff for \$2250, upon which the judgment was entered which this appeal seeks to reverse.

The declaration originally consisted of two counts, but the court instructed the jury that there could be no recovery under the second count of the declaration. The gist of the first count was that plaintiff was an employee of the defendant, and was injured because he attempted to obey an order of a "foreman whose orders and directions it was his duty to obey, and who was not a fellow-servant of the plaintiff", and that "owing to his immaturity of age and his inexperience he did not appreciate the danger incident to the act" which said foreman had ordered him to do, and that said foreman "knew or should have known" that it was dangerous for plaintiff to do the act which he was directed to do, which act was in the line of his duties as such employee of the defendant. Two witnesses testified on behalf of the plaintiff, viz: the plaintiff and the physician who attended him after the accident. The defendant introduced no evidence except three photographs of the

THE
STATE
OF
NEW
JERSEY
IN SENATE,
January 19, 1911.

REPORT
OF THE
COMMISSIONER
OF THE
LAND OFFICE.

1821 A. 158

THE HOUSE OF REPRESENTATIVES HAS PASSED THE FOLLOWING RESOLUTION:

Resolved, That the Commission of the Land Office be and they are authorized to make a survey of the lands of the State, and to report thereon to the Senate and House of Representatives at the next session of the Legislature.

The Commission of the Land Office, consisting of the Governor, the Attorney General, and the Commissioner of the Land Office, have the honor to acknowledge the receipt of the above resolution, and to report to the Senate and House of Representatives that they have complied with the same, and have made a survey of the lands of the State, and have reported thereon to the Senate and House of Representatives at the next session of the Legislature.

building and place of the accident. At the conclusion of plaintiff's case, the defendant asked the court for a directed verdict in its favor, which motion was denied. This motion was renewed at the close of all the evidence and was also denied.

The accident occurred on the afternoon of December 13, 1906. Plaintiff was then about **eighteen** years and six months old. The following facts appear from the testimony of the plaintiff, to-wit: Plaintiff had attended grammar school until he was thirteen years of age, he having then reached the third grade. At the age of fourteen he went to work for the American Can Company, working for about five weeks putting covers on cans with his hands and working at the process of oiling tin. Then for about two years he worked for another employer "taking mouldings away" from a moulding machine, which was operated by means of cogs, a fly wheel, etc. Thereafter he worked for a leather manufacturing company for six months, working alone on a "chopping block", and using a die and maul. Thereafter he worked for another can company, putting covers on cans and feeding a can-making machine driven by a belt. In September, 1906, over three months prior to the accident, he started to work for the defendant and continued so to work until the day of the accident. The superintendent of defendant engaged plaintiff as a sheet metal worker's helper, and instructed him to obey any of the mechanics for whom he might work as a helper. These mechanics worked on rain spouts, fire proof windows, cornices, etc., and much of plaintiff's work took him "right up on the edges of the roofs". On the day of the accident, and for about two weeks prior thereto, plaintiff was working on the Oak Park Hospital building. He had been told to act as a helper to one Leipsinger, a mechanic, and to do whatever the latter ordered

...and place of the accident. At the same time, the witness asked the driver for a license. The witness also asked the driver for a license. This witness was present at the time of all the evidence and was not de-

The witness continued on the afternoon of December 19, 1934. The witness was then about 45 years old and was married.

At the time of the accident, the witness was driving a 1934 Ford V8 sedan. The witness was driving on the highway at the time of the accident. The witness was driving at the time of the accident. The witness was driving at the time of the accident.

The witness, working for about 15 years in the same place, was driving the car at the time of the accident. The witness was driving the car at the time of the accident. The witness was driving the car at the time of the accident.

A witness who was present at the time of the accident, was driving a 1934 Ford V8 sedan. The witness was driving the car at the time of the accident. The witness was driving the car at the time of the accident.

The witness was driving the car at the time of the accident. The witness was driving the car at the time of the accident. The witness was driving the car at the time of the accident.

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The witness was driving the car at the time of the accident. The witness was driving the car at the time of the accident. The witness was driving the car at the time of the accident.

him to do. They were engaged in putting up rain spouts and sky lights and "flashing" a copper roof, and plaintiff attended to the irons and handed the tools to Leipsinger when the latter asked for them. A little after four o'clock on the day of the accident they had finished the copper roof on said building, and Leipsinger then decided to connect up a rain spout, which ran up and down the north side of the building, about three feet from the east end. To get to this spout, Leipsinger stepped out of a second story window, from ten to twenty feet from the spout, and upon a ledge which ran around the building about twenty-five feet above the ground. This ledge was about fourteen inches wide and "slanted a little bit about two inches from the brick and then went straight. It was level for about twelve inches" and wide enough to walk upon. Plaintiff followed Leipsinger out upon the ledge, because there were no openings in the wall of the building which would permit him to hand the tools to Leipsinger from the inside. There were "no windows or anything of that sort" to hold on to when one was on the ledge, and plaintiff testified that he knew that when walking along the ledge he had to be very careful not to fall off. Leipsinger went up on a swinging scaffold, built for just one man, and started to work about eight or ten feet above plaintiff's head and about fifteen feet above the ledge. Leipsinger, while on this scaffold, pulled himself up and down by means of a "lead" rope which hung down past the ledge. Plaintiff had carried a fire pot, used to heat soldering irons with, out upon the ledge, and Leipsinger told him to "go upstairs and get the rope and hoist these irons up". Plaintiff got the rope, went out upon the ledge and was going to tie the rope to the "lead" line when Leipsinger said "No, it takes too long that way; throw it up; we will get the job done quicker; we have only got fifteen minutes

to do it in". Plaintiff thereupon coiled the rope, and with his left hand threw it up towards Leipsinger, but the latter did not catch it. Plaintiff then again coiled the rope and again threw it up with the left hand, using no more force than when he threw it the first time, and plaintiff testified that the second time he threw the rope, "I was bearing up against the side of the building, with my right hand, so I could hold myself on the ledge and keep from falling off the ledge". While throwing the rope the second time, plaintiff "overbalanced and fell" to the ground below and suffered the injuries complained of.

Counsel for defendant contends that the judgment should be reversed, ^{because} (1) plaintiff assumed the risk, and (2) was guilty of contributory negligence in failing to make use of the "lead" line which hung near him in order to steady himself when he threw the rope, and (3) the court erred in giving the one instruction offered by the plaintiff and in modifying one of the instructions offered by defendant.

Under the facts of this case, we are of the opinion that plaintiff is not entitled to recover, on the ground that he assumed the risk of the danger and the injuries received by him. We do not think that plaintiff was misled by the order of Leipsinger, or that he did not appreciate the danger incident to the throwing of the rope while in the position he was.

In Republic Iron & Steel Co. v. Lee, 227 Ill. 248, 258, it is said: "An exception to the doctrine of assumed risk exists where a servant is ordered by his master to do certain work which is attended with danger of which he is not fully cognizant, and he relies upon the order to do the work as an assurance that he may safely perform the task. * * * It is only where the servant has been misled by the order of

is on it in. Plaintiff therefore called the rope, and with
his left hand upon it as a means of support, but the falling
all was over it. Plaintiff then again called the rope and
again upon it as with the left hand, making no other force
than was in there in the first time, and plaintiff testified
that the second time he threw the rope, "I was leaning up
against the side of the building with my right hand, and I
was holding myself on the rope and was falling out the
hole." While throwing the rope the second time, plaintiff
"was leaning and fell" as the ground below had softened the
surface consisted of.

Concerning the testimony plaintiff that the judgment should
be reversed, (1) Plaintiff showed the first, and (2) was guilty
of contributory negligence in failing to take care of the "hole"
like when they were in order to remedy plaintiff when he
threw the rope, and (3) the court went in giving the law in
favor of the plaintiff and in relieving him of
the responsibility of the accident.

Under the facts of this case, in view of the opinion
that plaintiff is not entitled to recover, on the ground that
he assumed the risk of the danger and the injuries caused by
him. We do not think that plaintiff was aided by the order of
plaintiff, or that he did not appreciate the danger involved
in the throwing of the rope while in the position he was.

In Remittitur from \$1000.00 to \$500.00 and all costs.
and it is so ordered. "The exception to the finding of liability
was entered when a motion is granted by the court to do
without the finding of liability with respect to which he is not
fully satisfied, and he asked upon the motion to do the same
as an exception that he was solely parties the court was a
It is only where the court has been misled by the evidence

the master that the exception exists".

In Elgin J. & E. Ry. Co. v. Meyers, 224 Ill. 338, 339, it is said: "Where the servant knows of a defect, or what the danger is, he cannot be said to rely upon the assurance that the danger does not exist. It is only where the servant has been misled by the assurance of the master, or some one standing in the master's place, that he can excuse himself from the assumption of risk on the ground that he has been assured by the master that there is no danger in the use of the appliance or piece of machinery which he knows, as a matter of fact, is defective and the use thereof attended with danger". As was said in the case of Galloway v. Chicago R. I. & P. Ry. Co., 254 Ill. 474, 481: "We do not think there is any evidence in this record that indicates any incapacity of the appellee, by reason of ignorance, immaturity or inexperience, to fully understand and fully appreciate the danger to which he was exposed". And as was said in Kresmar v. Omaha Packing Co., 153 Ill. App. 336, 343: "The plaintiff had passed beyond the stage of thoughtless childhood and was not entitled to special care by the defendant, as his employer, on account of his age. Whatever danger there was in his employment was not hidden but was open and obvious. He was of sufficient age and discretion to understand and appreciate the risk to which he was exposed, and must be held to have assumed the ordinary hazards and perils of his employment".

The judgment of the Superior Court is reversed with a finding of facts to be incorporated in the judgment of this case.

REVERSED WITH FINDING OF FACTS.

[illegible]

Finding of facts: We find, as ultimate facts in this case, that appellee knew of and appreciated the danger incurred by him in throwing the rope mentioned in the proofs, while standing on the ledge of the building, and that he assumed the risk of such danger and of the injuries sustained by him.

March Term, 1912, No.
315 - 18355.

FRANK TRENKHORST MFG. CO.,
a Corporation,
Defendant in Error,

vs.

JOHN PETER,
Plaintiff in Error.

)
)
) ERROR TO
)
) MUNICIPAL COURT
)
) OF CHICAGO.
)

182 I.A. 160

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

John Peter, defendant below, seeks by this writ to reverse a judgment against him for \$627.99, rendered in the Municipal court of Chicago, upon the verdict of a jury, in an action of the fourth class commenced by Frank Trenkhorst Mfg. Co., a corporation, plaintiff below, for damages for alleged breach of contract.

It appears from the evidence that Frank Trenkhorst, president of plaintiff company, had several conversations in the fall of 1909 with defendant relative to a "corrugated iron job" on the buildings of the Corn Products Co., at Argo, Illinois. Trenkhorst told defendant that his company was intending to bid on the job and asked defendant "for a price on No. 18 and No. 20 corrugated iron". A day or two afterwards, according to the testimony of Trenkhorst, the defendant told Trenkhorst that "he would put on No. 18 corrugated iron for \$10 a square, and No. 20 for \$9.50 a square"; that at this time Trenkhorst did not tell defendant how many "squares" there were in the job or exhibit any plans or specifications, but said that he would send defendant blue prints as soon as he got them from the Corn Products Co., and that nothing was said as to when the work was to be completed and when payments were to be made. According to the testimony of the defendant, when he (defendant) quoted the above price, it was "only estimating", and that he told Trenkhorst that he had "got to have some plans". On October 8th,

plaintiff wrote defendant as follows: "You can enter our order for about 340 squares of No. 20 corrugated galvanized iron, to be put on buildings at Argo, Illinois, for the amount of \$9.50 per square, less \$200 after the job is completed. You might proceed with this work at your earliest convenience". On October 13th, plaintiff sent defendant the blue prints by a messenger boy. On October 15th, defendant wrote plaintiff to the effect that he (defendant) had been out to Argo, Illinois, with one of his best mechanics, and that he found that he could not handle "that job" or that "kind of work". Defendant testified that, in one of the conversations with Trenkhorst before he saw the blue prints, Trenkhorst told him that "it was a one-story building and the iron and slates riveted", and that, after he had received the blue prints and had made the trip to Argo, he found that things were "entirely different", and that "there was a big elevator, about six stories high, and everything had to be put on by hand on a scaffold". Fourteen days after plaintiff had received defendant's letter of October 15th, refusing to handle the job, to-wit: on October 30th, plaintiff wrote defendant as follows: "We will be obliged to look for another contractor to do the corrugated iron work which you contracted for, and will hold you responsible for the difference in the price". Defendant did not reply to this letter and had no further conversations with any representative of the plaintiff. Trenkhorst testified that after inquiring of the Sykes Roofing Co. and of the MacFarlane Roofing Co., he arranged with the former company, on November 1st, to do the work and that that company "completed the job" in April, 1910; that there were 871 1/2 squares in all of the buildings; that the price charged by the Sykes Co. was \$10.22 1/17 per square, which amounted to the total sum of \$8,907.24; that he paid this sum to the Sykes

[illegible]

Co.; that at the price quoted by defendant of \$9.50 a square the total amount would be \$8279.25, and that the difference was the sum of \$427.99. Trenkhorst was unable to testify that this price of \$10.22 1/17 per square was the reasonable and fair market price, and no other witness testified that it was. At the trial the attorney for defendant objected to the witness, Trenkhorst, testifying as to the amount which the plaintiff had actually paid to the Sykes Co. and to the difference between this sum and the said sum of \$8279.25, as not tending to show the proper measure of damages, but the objection was overruled by the trial court.

We are of the opinion that the verdict and judgment rendered in this case are contrary to the law and the evidence, and that the judgment should be reversed and the cause remanded for a new trial. Passing the question as to whether or not the evidence sufficiently shows that there was a definite contract made between the parties, as to which we express no opinion, but assuming that there was a contract and a breach thereof by the defendant, plaintiff's damages were not properly proven. (Sertram v. Bergquist, 153 Ill. App. 43, 45.) Furthermore, in plaintiff's letter of October 8th, the order is for "about 840 squares", and, as is evident from the testimony and the amount of the verdict and judgment, the court must have considered that the defendant could be properly chargeable on the said difference in the price per square on 871 1/2 squares, which, in our opinion, under the evidence in this record, cannot be sustained.

REVERSED AND REMANDED.

1. The first of the prices quoted by defendant on 12/10/42 was \$100.00 per ton of 20/22 cottonseed oil. This price was the same as the price quoted by defendant on 12/10/42 for 20/22 cottonseed oil. The second of the prices quoted by defendant on 12/10/42 was \$100.00 per ton of 20/22 cottonseed oil. This price was the same as the price quoted by defendant on 12/10/42 for 20/22 cottonseed oil. The third of the prices quoted by defendant on 12/10/42 was \$100.00 per ton of 20/22 cottonseed oil. This price was the same as the price quoted by defendant on 12/10/42 for 20/22 cottonseed oil. The fourth of the prices quoted by defendant on 12/10/42 was \$100.00 per ton of 20/22 cottonseed oil. This price was the same as the price quoted by defendant on 12/10/42 for 20/22 cottonseed oil. The fifth of the prices quoted by defendant on 12/10/42 was \$100.00 per ton of 20/22 cottonseed oil. This price was the same as the price quoted by defendant on 12/10/42 for 20/22 cottonseed oil. The sixth of the prices quoted by defendant on 12/10/42 was \$100.00 per ton of 20/22 cottonseed oil. This price was the same as the price quoted by defendant on 12/10/42 for 20/22 cottonseed oil. The seventh of the prices quoted by defendant on 12/10/42 was \$100.00 per ton of 20/22 cottonseed oil. This price was the same as the price quoted by defendant on 12/10/42 for 20/22 cottonseed oil. The eighth of the prices quoted by defendant on 12/10/42 was \$100.00 per ton of 20/22 cottonseed oil. This price was the same as the price quoted by defendant on 12/10/42 for 20/22 cottonseed oil. The ninth of the prices quoted by defendant on 12/10/42 was \$100.00 per ton of 20/22 cottonseed oil. This price was the same as the price quoted by defendant on 12/10/42 for 20/22 cottonseed oil. The tenth of the prices quoted by defendant on 12/10/42 was \$100.00 per ton of 20/22 cottonseed oil. This price was the same as the price quoted by defendant on 12/10/42 for 20/22 cottonseed oil.

[illegible]

335 - 18375.

THE QUALITY CAR COMPANY,
a Corporation, Appellee,
vs.
J. J. CONKILL, Appellant

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

182 I.A. 175

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago for \$2000, in favor of The Quality Car Company, a corporation, plaintiff below, and against J. J. Corhill, defendant below, in an action of the first class. The case was tried before the court without a jury, and was commenced by the filing of an affidavit, etc., for an attachment, but subsequently the defendant entered into a recognizance in open court and the attachment was dissolved.

Plaintiff's claim was for money due upon the following note, to-wit:

\$2000.

Jan. 20, 1911.

3 months after date I promise to pay to the order of Premier Motor Mfg. Co. Two Thousand and no/100 Dollars at 2329 Michigan Ave., Chicago. Value received, with interest at the rate of 5 1/2 per cent per annum.

J. J. Corkill.

The following endorsements appeared on the back of the note:

Premier Motor Mfg. Co.
By W. E. Stalnaker.

Pay to the order of
Continental and Commercial National Bank
of Chicago.

All Prior Endorsements Guaranteed.
The Quality Car Company.

The defendant, in his original affidavit of merits, admitted the execution of the note, and stated that he delivered

the same to the plaintiff at the latter's request, that said execution and delivery was wholly without consideration and solely for the accommodation of the plaintiff, that the note was delivered by the plaintiff to the Premier Co., and that at the time of the endorsement and delivery of the note by the Premier Co. to the plaintiff, the plaintiff was not a purchaser for value and well knew that the note was without consideration. The trial of the case was originally commenced on June 9, 1911, at which time the plaintiff, to maintain the issues on its part, offered the note in evidence, and no objection to its introduction was made by defendant, and plaintiff rested its case. The defendant thereupon called W. E. Stalnaker, general manager of plaintiff, as a witness under section 33 of the Municipal Court Act, and, after he was examined at some length, the attorney for defendant asked leave that time be given defendant to prepare and file an amended affidavit of merits, which motion was granted and the further trial of the case was continued. On August 17th the amended affidavit was filed in which the defendant again stated that the note was executed by the defendant and delivered to the plaintiff at the latter's request, and that the execution and delivery was wholly without consideration and solely for plaintiff's accommodation, but stated that the note was never delivered by the plaintiff to the Premier Co., and was never endorsed by the Premier Co. to the plaintiff. The trial of the case was resumed on October 2, 1911.

It appeared from the evidence that the Premier Co., a corporation, manufactured automobiles at Indianapolis, Indiana; that this company was represented in Chicago by the plaintiff company, which was a separate corporation and engaged principally in selling the automobiles manufactured by the Premier Co.; that H. C. Smith was the president of the Premier Co.; that

the fact of the plaintiff's request, that said
plaintiff and delivery was finally without consideration and
entirely for the consideration of the plaintiff, that the same
was delivered by the plaintiff to the trustee on, and that
at the time of the endorsement and delivery of the note by the
trustee to the plaintiff, the plaintiff was not a partner
in the same and well knew that the note was without consideration.
The fact of the same was originally introduced on June 1, 1911,
at which time the plaintiff, as defendant, was located on the part
of the note in evidence, and in evidence in the testimony
this was made by defendant, and plaintiff denied the same. The
defendant's testimony being that in evidence, defendant's answer of
plaintiff, is a statement of the fact that the plaintiff was
not, and after the endorsement and delivery, the plaintiff was
defendant's answer being that the plaintiff was not
and this is further evidence of the fact that the plaintiff was not
and the further trial of the same was continued. On August 17th
the plaintiff's answer was filed in which the defendant again
stated that the note was endorsed by the defendant and delivered
to the plaintiff at the plaintiff's request, and that the defendant
and delivery was finally without consideration and solely for
plaintiff's consideration, but stated that the note was never
delivered by the plaintiff to the trustee on, and was never
endorsed by the trustee on, so the plaintiff. The trial of the
case was resumed on October 2, 1911.
It appeared from the evidence that the trustee on, a
corporation, manufactured and sold at Indianapolis, Indiana,
that this company was represented in Chicago by the plaintiff
company, which was a separate corporation and engaged principally
in selling the manufactured goods by the trustee on.
That A. J. Smith was the president of the trustee on, that

W. E. Stalnaker was the general manager of the plaintiff in charge of its business in Chicago, but was not an officer of the Premier Co.; that defendant was the owner of a "1910" four cylinder Premier automobile and that in December, 1910, defendant and Stalnaker had a conversation as to the defendant purchasing a new six cylinder Premier car of plaintiff, the price Stalnaker would charge for such a car, and how defendant's old car should be disposed of. The testimony of defendant and Stalnaker as to what was said at this conversation is quite conflicting. The defendant says that the conversation was to the effect that plaintiff would sell to defendant a new car for about \$3100, and plaintiff would take defendant's old car in trade at the sum of about \$2500, and defendant pay plaintiff the difference in cash. Stalnaker says that he told defendant that the price of the new car was \$3500, that he would not take defendant's old car in trade at the price suggested by defendant, viz: \$2500, but that he would sell defendant the new car for \$3150, the defendant to dispose of his old car himself. Whatever the conversation was, on December 8, 1910, plaintiff, by Stalnaker, "Gen. Mgr.", wrote defendant in part as follows: "Confirming our conversation of to-day, we will furnish you one of our six cylinder Clubman cars * * for the sum of \$3500, f.o.b. Indianapolis; * * we are to allow you on the purchase price of this car the sum of \$350, as a commission to you on account of your disposing of your present 1910 Premier car. In other words, you are to pay us \$3150. * * We are to have the six cylinder car ready for delivery as soon after January 1st as possible". This letter was received by defendant. As to what subsequently occurred between the parties, the testimony of Stalnaker and defendant is also very conflicting. Stalnaker testifies that a few days thereafter defendant called and said "I got your letter, and it is all right. Go ahead and order the car", and that Stal-

at the University and the General Manager of the University in
 charge of the business in Chicago, but not an officer of
 the University. (The University was the owner of a "1913" car
 cylinder, cylinder and that in Chicago, 1913, Chicago
 and was delivered to a manufacturer as to the delivery of
 and a few days before the car of Chicago, the car was
 taken from Chicago for some time, and the University's car
 should be delivered. The University of Chicago and Chicago
 as to what was said to the University of Chicago.
 The University says that the conversation was to the effect that
 Chicago would sell to defendant a new car for about \$100, and
 Chicago would take defendant's old car in trade on the car of
 about \$100, and defendant pay Chicago the difference in cash.
 Chicago says that he told defendant that the price of the new
 car was \$1000, that he would not take defendant's old car in trade
 at the price suggested by defendant, viz: \$100, but that he would
 sell defendant the new car for \$100, the difference in Chicago of
 his old car himself. However the conversation was, on January
 4, 1913, Chicago, by Chicago, "see, see", wrote defendant in
 fact as follows: "Chicago and conversation of Chicago, as will
 further the car of our 1913 cylinder Chicago car - a few days
 at Chicago, 1913, Indianapolis; - as to the car on the
 Chicago car. This car the car of Chicago, as a manufacturer in the
 in account of your delivery of your present 1913 cylinder car. In
 other words, you are to pay me \$100. - as to the car the car
 Chicago car ready for delivery as soon after January 1st as poss-
 ible. This letter was received by defendant. As to what was
 actually occurred between the parties, the testimony of Chicago
 and defendant is also very conflicting. Chicago testifies that
 a few days before the delivery called and said "I am your father,
 and it is all right. He should and order the car", and that the

maker ordered it of the Premier Co.; that after the car had arrived defendant again called and said that he had not yet disposed of his old car and that he would be obliged to pay for the new car partly in notes; that after several conversations it was agreed that defendant would pay \$450 in cash, give a thirty day note for \$500, and a 3 months' note for \$2000, and that the notes should be made payable to the Premier Co., inasmuch as the Premier Co. had charged the plaintiff with the wholesale price of said car and Stalnaker thought he could turn over the notes to the Premier Co. in part payment of plaintiff's indebtedness to the Premier Co. for said car; that, accordingly, on January 20, 1911, the defendant gave a check for \$650 and personally wrote out the notes in plaintiff's office and signed them, and the new car was delivered to defendant and a written memorandum of the sale, or invoice, was mailed to defendant. According to the defendant's version the agreement was entirely different. Defendant testified that shortly after the receipt of plaintiff's letter of December 8th, defendant called and said that the written proposition was entirely at variance with the talk previously had; that after several conversations Stalnaker finally agreed that he would take the old car in trade at the price of \$2500 and would be able to sell the same before the notes became due, and that defendant signed the notes with the understanding that the notes were merely accommodation notes, pending the sale by plaintiff of the old car, and were to be sent to the Premier Co. and not to be placed in any Chicago bank. Stalnaker, on the contrary, testified that absolutely nothing was ever said to him by defendant about the notes being accommodation notes, or that he (Stalnaker) at any time said that he would take the defendant's old car in trade for any such sum. Although the letter of January 20, 1911, mailed to defendant and being a written memoran-

right-handed is of the President's. That after the two had
 returned, the President again called and said that he had not yet
 received the bill and that he would be obliged to pay for the
 new bill early in the day. That after several conversations it
 was agreed that the President would pay for the bill in full
 and that the bill would be paid for by the President. That the
 President had changed the bill with the President's
 of said bill and that the President had changed the bill
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 in the President's bill, the President, accordingly, on January
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 President was called in the President's bill and the
 bill. That after several conversations the President called
 that he would take the bill and the President's bill
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 and that the President called the bill and the President's bill
 the notes were mostly uncommenced, the bill was
 President of the bill, and was to be paid in the President's
 and not to be placed in any other bill. The President, on the
 every, testified that absolutely nothing was said to him by
 defendant about the notes being uncommenced, or that he
 (Witness) at any time said that he would take the President's
 and not in cash for any other bill. Although the President's
 money on, 1911, called to defendant and being a witness

dum of the sale of the car, appears to have reached its destination, defendant made no objection to the terms thereof. He says in excuse of this that he does not recollect having seen this paper until after the present suit was commenced, when he went through certain files and found it, and that his secretary must have received the letter and filed it away without showing it to him. This paper was a memorandum or invoice to the effect that plaintiff had "sold" to defendant a "Premier, 1911, Clubman" car at the net price of \$3150, and that there had been received "on the above account" a check for \$650, a thirty day note for \$500 and a ninety day note for \$2000.

Stalnaker testified that the day following the sale and delivery of the new car to the defendant, he telephoned H. O. Smith, president of Premier Co., at Indianapolis, informed him that plaintiff had delivered the car to defendant and had taken the two notes, and that plaintiff would send said notes to the Premier Co. in payment of that much of plaintiff's indebtedness to the Premier Co. on said car; that thereupon Smith replied: "Don't send the notes to us. We want the money. You hold the notes and collect them"; that Stalnaker then said that he had had the notes made payable to the Premier Co.; that Smith replied that he "didn't care anything about that", and further said: "You go ahead and collect them, and hold them until they are due and deposit them in the bank for collection and send us all the proceeds". Stalnaker further testified that about the time the notes respectively fell due he endorsed them "Premier Motor Mfg. Co., by W. E. Stalnaker", and deposited them with the bank for collection, and that the \$2000 note, from the time of its execution until it was so deposited in the bank, was continuously in the possession of plaintiff.

After the \$800 note had matured and had been deposited for collection with the bank and defendant had been notified by the bank, defendant wrote Stalnaker as follows: "Dear Stalnaker: I only got in town at 1:30 and received notice from the bank of note due. This escaped me as I thought it was 3 months. * * I enclose ck. for \$200 and a new note for \$300, which I hope will be acceptable to you. Pls. mail old note to me at the club". Plaintiff accepted the check and the new note. The new note was dated Feby. 23, 1911, was made payable to the order of the Premier Co., was deposited in the bank for collection by plaintiff bearing the same endorsements as the \$300 note, and was paid by defendant shortly after maturity. When the \$2000 note matured it was not paid and plaintiff commenced this action.

It is first contended by counsel for defendant that the finding and judgment of the trial court is erroneous because the evidence clearly established that the note sued on was an accommodation note and was without consideration. Without further discussion of the testimony, and particularly the portions thereof especially relied upon by counsel, suffice it to say that after careful examination of the voluminous record we are of the opinion that the finding and judgment are sufficiently supported by the evidence. The introduction of the note in evidence, without objection, made a prima facie case for the plaintiff, and the burden of proving that the note was without consideration and was a mere accommodation note rested upon the defendant, (McKeand v. Feinberg, 145 Ill. App. 274, 277; Momicken v. Safford, 197 Ill. 540; Stacker v. Hewitt, 1 Scam. 207) and we cannot say that the defendant clearly established his ~~xxxxx~~ contention. In fact, we think that the preponderance of the evidence is against defendant's contention.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine organization or a front organization for the Government of the United States.

and the fact that the Commission has been unable to obtain any information from the Government regarding the activities of the various groups mentioned above.

[illegible]

and a group representative was called upon for information. The group of people at the time of the meeting was not large and the group representative was not present at the time of the meeting.

121-1000: William W. Bishop, I have no record for him
The following is a list of the names of the persons who
had the opportunity of the evidence in the case of

... ..

It is next urged that a delivery of a note to the payee is necessary to its validity, and that, inasmuch as the note in question never passed into the actual possession of the Premier Co., no delivery to the payee was shown. We do not think that there is any merit in the contention. A delivery of a note to a third person as agent of the payee, and by which the maker loses control of the note, is a sufficient delivery. (Shaw v. Camp, 180 Ill. 426, 429.) "It is not indispensable to the delivery of a promissory note that it should pass into the personal possession of the payee. If delivery is made to another, for the payee, without condition, his acceptance of it may be presumed, and the delivery of it will be complete". (Gordon v. Adams, 127 Ill. 223, 226.) The defendant in both his original and amended affidavit of merits admitted that he delivered the note to the plaintiff. Under the facts of this case, we think that the defendant signed and delivered the note with the intention of thereby paying in part for the new car which he had purchased from the plaintiff, but that, at Stalnaker's request and for the reasons stated by Stalnaker, the Premier Co. was named as payee in the note. The legal title to the note was then either in the Premier Co. or the plaintiff, and it was subsequently endorsed by the Premier Co., per Stalnaker, over to the plaintiff.

But counsel further contend that the note was not in fact endorsed by the Premier Co. to the plaintiff, and plaintiff never acquired title to the note and the right to sue thereon, for the reason that there is no evidence showing Stalnaker's authority to endorse the note on behalf of the Premier Co. over to plaintiff. We think that the testimony of Stalnaker as to the directions he received from Smith, president of the Premier Co., over the telephone, sufficiently shows, under the facts of this case, Stalnaker's authority to endorse said note so as to enable

It is not denied that a delivery of a note to the payee
is necessary to the validity, and that, inasmuch as the note in
question never passed into the actual possession of the payee,
no delivery of the paper was shown, and no such thing that
there is any doubt as to the correctness of a note to a
third person as agent of the payee, and by which the latter loses
control of the note, is a sufficient delivery. (Hunt v. Hunt,
129 Ill. 400, 401.) It is not independent of the delivery of
a promissory note that it should pass into the personal possession
of the payee. If delivery is made to another, the note passes,
without condition, the consequence of it may be reversed, and the
delivery of it will be complete. (Hunt v. Hunt, 129 Ill. 400.)
The defendant to both the original and amended petitions
of service admitted that he delivered the note to the plaintiff,
under the facts of this case, and that the defendant signed
and delivered the note with the intention of thereby making it
good for the new one which he had purchased from the plaintiff,
and that, at defendant's request and for the reasons stated by
himself, the plaintiff was named as payee in the note. The
legal title to the note was then given to the plaintiff, and the
plaintiff, and it was subsequently assigned by the plaintiff to
the defendant, over to the plaintiff.
The defendant further claimed that the note was not in
fact endorsed by the plaintiff to the plaintiff, and plaintiff
never acquired title to the note and the right to sue thereon,
for the reason that there is no evidence showing defendant's
intention to deliver the note on behalf of the plaintiff, over
to plaintiff. He also that the assignment of defendant to the
plaintiff is reversed from which, plaintiff of the plaintiff to
over the defendant, and plaintiff, under the facts of this
case, defendant's intention to deliver said note to the plaintiff

plaintiff to sue thereon in its own name. Section 12 of the "Negotiable Instrument Law" of 1907 provides: "The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency". In Fountain v. Bookstaver, 141 Ill. 481, 483, it is said: "Authority to an agent to execute or indorse a negotiable instrument may be given by parol, and no particular form of words is necessary for that purpose".

For the reasons indicated the judgment of the Municipal Court is affirmed.

AFFIRMED.

March Term, 1912, No.

343 - 18383.

MARY COLLINS,
Appellee,

vs.

CHICAGO CITY RAILWAY
COMPANY,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

182 I.A. 176

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County, rendered upon the verdict of a jury, in favor of Mary Collins, plaintiff below, and against Chicago City Railway Company, defendant below, for \$2000, as damages for injuries sustained by plaintiff while attempting to board one of defendant's electric street cars at the intersection of 28th street and Wentworth avenue, in the city of Chicago.

Wentworth avenue runs in a north and south direction and is intersected at right angles by 28th street. At the time of the accident, which occurred on November 23, 1909, between 9 and 10 o'clock in the evening, the defendant had double track lines of street railway in both streets. North-bound cars in Wentworth avenue ran on the east track and south-bound cars on the west track. East-bound cars in 28th street ran on the south track and west-bound cars on the north track. Plaintiff was an unmarried woman, about 31 years of age, and had been employed at Mercy Hospital, in charge of the pantry, for about four years.

Plaintiff's declaration consisted of three counts. The first count alleged, in substance, that on said date she was a passenger on one of defendant's street cars moving north on Wentworth avenue; that when said car arrived at 28th street she alighted for the purpose of becoming a passenger on another one of defendant's cars "then moving" east over defendant's 28th

street tracks; that said other car then came to a stop at or near the intersection of said streets for the purpose of receiving and discharging passengers; that plaintiff, while in the exercise of due care, etc., then and there attempted to board said other car, and, while so doing, the defendant, by its servants and agents, "so carelessly, negligently and improperly managed and operated said car that * * said car was jolted, jerked and moved suddenly forward", whereby plaintiff was thrown with great force "against the parts of said car and off of said car and down on the street there", and was severely and permanently injured, etc. The second count alleged, in substance, that plaintiff alighted from the Wentworth avenue car at the intersection of said streets, for the purpose of then becoming a passenger on another car of defendant's "then standing" on defendant's said tracks on 26th street at or near said intersection of said streets; that plaintiff then and there approached said other car for the purpose of becoming a passenger thereon, all of which was well known to the servants and agents of defendant in charge of said other car; that when plaintiff reached said car and was attempting to board the same, and was in the exercise of due care, etc., said servants and agents in charge of said car "negligently and improperly started said car forward before the plaintiff had reasonable time to get safely on said car", whereby plaintiff was thrown with great force against the parts of said car and off of said car and down on the street, and was severely and permanently injured, etc. The gist of the third count was that, while plaintiff was attempting to board the car which was standing on said 26th street tracks, the defendant, by its servants and agents, "so wilfully, wantonly, recklessly and wrongfully" moved and operated said car that the same was caused to be suddenly jolted and jerked, whereby plaintiff was thrown, etc.

On the trial, at the conclusion of plaintiff's case, the attorney for defendant by three several motions requested the court to instruct the jury to find the defendant not guilty under each of said three counts, and at the conclusion of all the evidence these motions were renewed. The court, however, denied all of the motions. Counsel for defendant here contend that there was no evidence tending to sustain the charge contained in the third count of "wilful and wanton misconduct", and that the court's refusal to instruct the jury to find the defendant not guilty under that count constitutes prejudicial error. In our opinion, the first and second counts each stated a good cause of action, which counts there was evidence tending to support. While the court might properly have given the instruction asked as to the third count, the refusal so to do, there being sufficient evidence to support another good count of the declaration, is not ground for reversal. (Chicago etc. Coal Co. v. Moran, 210 Ill. 2, 13; Foster v. Shepherd, 134 Ill. App. 199, 201; Scott v. Parlin Co., 245 Ill. 400, 432; Colesar v. Star Coal Co., 255 Ill. 532, 540.)

Plaintiff's testimony was to the effect that on the evening of the accident, after visiting at a friend's home south of 26th street and west of Wentworth avenue, she boarded a Wentworth avenue car going north, paid her fare and received a transfer, and alighted from the car at 26th street at the drug store on the southeast corner of Wentworth avenue; that then she crossed Wentworth avenue to take a car east-bound on 26th street; that the car came along and she "waited until it stood still"; that the front end of the car stopped "a little piece" from the west crosswalk of Wentworth avenue and she attempted to get on the hind end of the car; that the conductor was standing inside about the middle, with "the lines in his

On the trial, at the conclusion of Marshall's case, the attorney for defendant he filed several motions requesting the court postpone the trial to give the defendant and family time to get their affairs in order, and at the conclusion of all the evidence there motion was granted. The court, however, denied all of the motions. Counsel for defendant then motioned that there not be evidence tending to establish the same was taken in the third round of "third and fourth rounds", and that the court's refusal to postpone the trial to give the defendant and family time to get their affairs in order was error. It was explained the third and fourth rounds were taken a great number of times, when motion there for evidence tending to support. While the court again refused to postpone the trial, it was explained as to the third round, the refusal to do so, there being sufficient evidence to prove motion was made at the conclusion, is not ground for postponement. (Exhibit 21)

[illegible]

hand * * his hand on the bell"; that she put her right foot on the first step, took hold of the car with her left hand and "held the iron", and was stepping up with her other foot when "he gave the car a jerk and it just turned me around and * * the corner of the car struck me and threw me facing south and east, or east"; that "the car gave such a jump it started me and I jerked right around and as I came down I felt the hip getting hit on the end of the car, and it threw me with the car east, and I laid there until the conductor came and picked me up"; that the conductor stood her up against the car, and the motor-man came, and when the latter heard her say that she lived at Mercy Hospital, he put her into the car and she rode as far as the hospital, which was located on the corner of 26th street and Prairie avenue; that she was carried to the hospital building and then taken to the operating room, where splints were put on her left arm and left hip; that both her arm and hip were fractured, and that she suffered severe and permanent injuries.

William Lewis, plaintiff's witness, a colored man, and at the time of the trial employed as a Pullman car porter, testified to the effect that on the evening of the accident he was employed as a waiter in the saloon and restaurant situated on the southwest corner of the intersection of the two streets; that he was standing just outside of the saloon and in front of the doorway, which is "like a cut-off on the corner that you can go in from both streets"; that he first saw plaintiff standing on the other side of the street near the drug store; that she crossed over to the west side of Wentworth avenue, "right in front of me", and stopped near the corner; that "pretty soon the street car came up and she walked on right by me, down to the side of the 26th street car * * and got on at the far end, and as she was getting up the bell rang and the car started off

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1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1991, but I don't think that has changed over the years.

— 1992 —

Journal of Interpersonal Violence 27(12)

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DOI 10.1002/pola.20000

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qualifying actions that are deemed to be "not" covered shall

But this time is the opportunity to make a difference.

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any of America's big big winners will be Jack Welch and GE itself.

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That we are standing fast against the actions and in 1944

THE ONLY 100% VEGAN RESTAURANT IN THE-STATE OF CALIFORNIA, SERVING HOT

to be from both theories: that no theory can simultaneously

THE UNIVERSITY OF CHICAGO PRESS

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The forecasts you will find have been filed with the SEC and are available at www.sec.gov.

and the lady fell from the car"; that when he heard the bell ring the lady "was about on the bottom step of the car", and the conductor "was standing near the center of the car, inside"; that the car had stopped before plaintiff attempted to board it; that when the car first stopped "the front of it was near on the street like, the cross line, * * the head of the car was right on the cross-walk"; that "the lady fell just before she got to the street, the rear end of the car got to the street"; that the car made a second stop, "some where near the other side of the cross line"; that when it stopped "the conductor runs down and grabs this lady over her arm and pulls her up and puts her on the car, he and another man"; and that the witness when he saw plaintiff fall did not leave the place where he was standing and run to her assistance because the accident "kind of excited" him, and he "could not get his mind together", and when he did the conductor was there, and because he was a colored man and she was a white lady.

The testimony of some of the defendant's witnesses is in irreconcilable conflict on certain material points with that of plaintiff and Lewis. Samuel Pagan, the conductor of the car, testified that when his car reached Wentworth avenue he was standing on the back platform; that he saw plaintiff standing at the corner as the car came to a stop; that plaintiff "grabbed at the handle with the right hand and * * made a step, then she fell"; that the car had not moved; that he tried to help her on the car but "she would not let me come near"; that she was right at the step on the ground; that "I hollered, and the motorman came and helped me. * * He was trying to put her on the car; she refused; * * we put her on the car; * * the motorman lifted her up"; that she was on the ground before being picked up about 4 minutes; that the car stopped altogether about 7 or 8

minutes; and that it made but the one stop at Wentworth avenue. Thomas Brennan, the motorman of the car, testified that when he first saw plaintiff she was sitting on the street about two feet from the rear end of the car and south of it; that "I asked her to get on the car; she told me to leave her alone; I said I would have to call the wagon; when I said that she said to put her on the car; I took her by the arm and she got up"; that from the time the car stopped to the time he put her on the car about 5 minutes had elapsed; that the car "made only one stop" at Wentworth avenue; that when the car reached the hospital he "carried her bodily into the hospital and helped her on a wheel chair". William Dunkel, a passenger on the car, testified that as the car approached Wentworth avenue he was sitting on the south side of the car looking out of the window; that he saw her on the street before the car stopped at 25th and Wentworth avenue; that he did ^{not} see her fall, but learned that she had fallen when the motorman and conductor brought her in; and that he did not remember how many stops the car made there that night. These other passengers in the car testified to the effect that but one stop of the car was made at 25th street and Wentworth avenue. Two of defendant's witnesses testified to the effect that they noticed the odor of liquor upon the breath of plaintiff that evening. Plaintiff, however, testified that she had not been drinking any intoxicating liquor that evening, in which she was corroborated by the testimony of the friend at whose home she visited just before starting on the Wentworth avenue car, and by the testimony of Sister Mary Helen, in charge of the emergency department of Mercy Hospital, to the effect that she saw and was near plaintiff, after she was brought home to the hospital, in the emergency hall and at the emergency entrance; that plaintiff was not under the influence of liquor and that there was no odor of it on her breath.

[illegible]

It is undisputed that plaintiff was severely injured, and counsel for defendant do not argue that the verdict is excessive.

The main contention relied on by counsel for a reversal is that the verdict is against the manifest weight of the evidence. The evidence is very conflicting on the question whether the defendant was guilty of the negligence charged in the first and second counts of the declaration, and the case is one peculiarly within the province of the jury. They saw and heard the various witnesses and observed their conduct and demeanor while on the witness-stand. We cannot say that their verdict is manifestly against the weight of the evidence, and that the judgment should be reversed for that reason.

It is next urged that the trial court erred in refusing to admit proper evidence. The conductor of the car, Fagan, after testifying that the car had stopped at the intersection of the two streets about 7 or 8 minutes, was asked why it was that the car stayed there so long, and he replied "because she refused to get on". On motion of the attorney for plaintiff the answer was stricken. Assuming that this was a statement of fact and not an expression of an opinion or conclusion, the court committed no error prejudicial to the defendant, because the witness just shortly before had testified that the motorman was trying to put her on the car and "she refused". And subsequently in the trial, when the motorman was on the stand, he testified that he asked her to get on the car and that "she told me to leave her alone". Nor do we think that it was prejudicial error for the court to refuse to allow the witness, Rowan, to answer the particular question put to him, as argued by counsel.

It is further urged that the court erred in refusing to give to the jury five certain instructions offered by the

It is admitted that Plaintiff was seriously injured.

His condition has improved so far as to enable him to walk.

Plaintiff.

The defendant's counsel on my behalf has a request.

It is that the court should require the plaintiff to file a bill.

and the defendant to file a bill of particulars.

The defendant was guilty of the negligence charged in the bill.

and caused damage to the plaintiff's car and to his person.

Plaintiff claims the payment of the bill. That he has paid

the various witnesses and attorneys their counsel and expenses.

and he has the amount of the bill. He claims that the

bill is correct and that the amount of the bill is correct.

Plaintiff claims he is entitled to the bill.

It is now asked that the bill be paid to the

bill to the plaintiff's counsel. The defendant of the bill is

asked to pay the bill to the plaintiff's counsel. The defendant

is asked to pay the bill to the plaintiff's counsel. The defendant

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defendant. The court gave 3 instructions offered by the plaintiff, and 24 instructions offered by the defendant. After examination of all the given instructions, we are of the opinion that the jury were fully instructed, and that no error, prejudicial to the defendant, was committed by the refusal to give the instructions mentioned. We think they were sufficiently covered by the other instructions.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

It is noted by the above instructions.

After the instructions completed, the following may now be completed:

Twentieth is the document, and completed in the document in
the case the party were fully instructed, and that in doing
completion of all the given instructions, as set in the case
this, and as instructions given in the document, and in
Twentieth, the party were fully instructed, and that in doing

230 - 17367

THOMAS FOULKES,
Defendant in Error,

vs.

FRANCIS M. STEWARD,
Plaintiff in Error.

)
) ERROR TO CIRCUIT COURT OF
)
) COOK COUNTY.
)

182 I.A. 193

In an action of assumpsit brought by Foulkes against Steward, in the Circuit Court, plaintiff had judgment December 23, 1909, against defendant for \$2247 damages, and defendant appealed. In June, 1910, on the stipulation of the parties, an order was entered in this Court dismissing the appeal and one in the Circuit Court vacating the judgment and dismissing the suit. Thereupon George A. Durant moved in the Circuit Court that the order vacating the judgment ^{and} dismissing the suit be ^Avacated on the ground that before the same was entered Foulkes had assigned the judgment to him. The motion was resisted by Foulkes, who testified that the writing produced by Durant purporting to be an assignment of the judgment was not executed by him, but that his purported signature thereto was a forgery. The Court found that the assignment was executed by Foulkes and set aside the order vacating the judgment and dismissing the suit. On appeal that order was affirmed by this Court and leave given Durant to defend in the name of Foulkes the writ of error which Steward had sued out to reverse the judgment of December 23, 1909, and he has filed his brief and argument accordingly.

The action is in form assumpsit. The declaration consists of a special count and the common counts. The special count alleges in substance that defendant, before and on the 27th day of August, 1901, was a physician in Chicago, who em-

STATE OF ILLINOIS
COUNTY OF COOK
IN SENATE
JANUARY 1, 1903

REPORT

REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE

In an action at law brought by the State of Illinois against the Chicago and North Western Railway Company, in the Circuit Court of Cook County, Illinois, on the 15th day of January, 1903, the following facts were established:

The Chicago and North Western Railway Company, a corporation organized under the laws of the State of Illinois, is the owner and possessor of a certain tract of land situated in Cook County, Illinois, and known as the "Chicago and North Western Railway Company's Land".

The State of Illinois, by its Attorney General, is the plaintiff in the above action, and the Chicago and North Western Railway Company is the defendant.

The complaint in the above action alleges that the Chicago and North Western Railway Company has wrongfully and unlawfully taken possession of the above land, and has refused to return it to the State of Illinois.

The defendant in its answer denies the allegations of the complaint, and claims that it is the lawful owner and possessor of the above land.

The case was tried by a jury, and the jury returned a verdict in favor of the defendant, finding that the Chicago and North Western Railway Company was the lawful owner and possessor of the above land.

The court, in its opinion, affirmed the verdict of the jury, and ordered that the costs of the action be paid by the State of Illinois.

The court further ordered that the Chicago and North Western Railway Company be awarded interest on the amount of the costs at the rate of six per cent per annum from the date of the verdict until the same are paid.

The court also ordered that the Chicago and North Western Railway Company be awarded the costs of its defense in the above action.

The court's decision in the above action is final and conclusive, and the State of Illinois is bound by the same.

The court's decision in the above action is a precedent for all future cases involving the same or similar facts.

The court's decision in the above action is a landmark case in the history of the State of Illinois, and it is one of the most important decisions ever rendered by the court.

The court's decision in the above action is a great victory for the State of Illinois, and it is a great triumph for the people of the State.

The court's decision in the above action is a great triumph for the law, and it is a great triumph for the justice system.

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ployed agents and employees to meet incoming trains and induce strangers to go to his office; that on said day one of such agents accosted plaintiff on his arrival in Chicago from the State of Iowa and, by falsely representing that the defendant was an eminent eye specialist and would examine his eyes free of charge, induced plaintiff to go to the office of defendant; that defendant falsely and fraudulently represented to plaintiff that he was suffering from a complication of diseases and that his optic nerve was so diseased that he would soon lose his eyesight unless he had immediate treatment, and that defendant offered to effect a permanent cure of his eyesight and the complication of diseases for the sum of \$800; that plaintiff believed the said representations to be true, relied implicitly thereon and paid defendant \$800 for the pretended treatment of the alleged ailments; that the representations made by defendant were false and defendant knew they were false, and that they were made for the purpose of defrauding plaintiff; that defendant was not an eye specialist; that plaintiff was in good health and his eyes in good condition, with the exception of the weakness incident to a man of his age. It is also alleged in this count that in the course of said pretended treatment, defendant, for the purpose of robbing plaintiff of a further sum of money, took plaintiff to a certain place on South Clark street for a Turkish bath, and while plaintiff was taking said bath defendant took from the pockets of plaintiff the further sum of \$150, which defendant kept and converted to his own use. That defendant thereby became liable to pay to plaintiff the said sums of money, amounting to \$1,500, which defendant undertook and promised to pay. The ad damnum was afterwards increased to \$2500.

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

We shall not attempt to state the evidence in detail. The recovery rests mainly on the testimony of the plaintiff and that testimony is so improbable in many respects, so self contradictory and so opposed to the testimony of other witnesses, that we think that the judgment should be reversed, and will only state our reasons for such conclusion.

The only ground on which Durant can defend the judgment is, that Foulkes assigned the judgment to him before he stipulated that the appeal should be dismissed in this Court and the judgment of the Circuit Court vacated by that Court. To maintain this position he was compelled to prove over the denial under oath of Foulkes, that the assignment produced by him was executed by Foulkes.

At the trial of the cause Foulkes testified substantially as alleged in the special count as to how he came to go to Steward's office August 27, 1901; that it was there agreed that he should pay Steward for treatment \$800; that he paid him \$450 in currency and at his request signed three papers, without reading them or having them read to him, which Steward said were promissory notes. He produced but one paper which he claimed was then signed, and that was a check for \$350. The testimony for the defendant was that the agreement was that Foulkes should pay \$350, and for that sum he gave his check. That he paid no currency and signed no papers other than the check. Foulkes further testified that fifteen months afterwards he saw at his bank in Danbury, Iowa, the papers that he signed August 27; that they were, "a check for \$350, a sight draft for \$210, and afterwards a note taken up there for \$150". He produced the

check but not the draft or note. . He afterwards testified that the note was sent to a bank at Danbury for collection in February, 1904, and introduced a letter from Ellen G. Roberts, dated March 6, 1904, notifying him that she had sent to the bank for collection his note for \$150, dated August 4, 1903, payable to the order of F. M. Steward. We think that the evidence fails to show that Foulkes ever gave Steward a sight draft for \$210, but does show that July 28, 1902, he gave him a check for \$210, and further shows that the only note for \$150 he ever gave Steward was given August 4, 1903, and that therefore his testimony as to the making of a sight draft for \$210 and a note for \$150 August 27, 1901, and that he saw said draft and note at his bank fifteen months later was not true.

A portion of the recovery was for \$150 alleged to have been stolen from plaintiff at a turkish bath house on the evening of August 27, 1901. This claim rests on the testimony of Foulkes alone. He testified that when he was at Steward's office the first time he was told to return at 7 P. M.; that he did so and went in a cab with Steward and Miss Roberts to the bath house, where he was given a bath and the \$150 taken from his trousers. Opposed to this testimony was the denial of Steward and Miss Roberts that they saw him in the evening of August 27 or that either ever went with him to a bath house, and the testimony of Abraham S. Beamish that Steward was at his house from 6 to 9:30 P. M. of the day in question; that he then paid Steward, who was his family physician, \$27.00 for medical service and was given a receipt, which he produced, and the testimony of Thomas Beamish, which corroborated the testimony of his father, Abraham S. Beamish. The Beamishes are horse shoers, each having his own shop, and no fact or circumstance is shown

[illegible][illegible]

affecting their credibility. The verdict for the plaintiff as to this claim is, in our opinion, clearly against the evidence and the trial Court should, for that reason, have granted a new trial.

Another part of the recovery was for \$500 paid by Foulkes by check to the order of H. J. Walters, treasurer, dated August 26, 1903. Foulkes testified that August 27, 1901, Steward gave him a written guaranty to cure him or refund the money; that he was not in Chicago between August 27, 1901, and August 24, 1903; that August 7, 1903, he wrote Steward, denouncing him as a swindler; stating among other things: "You got a check for \$350, a night draft for \$210, and \$450 in currency when I was at your office, and you stole \$150 out of my pocket when I was at the bath house"; that in answer Steward wrote him that if he would send him or to the People's Drug Store all their correspondence and the contract or agreement, he would refund the money paid him; that he afterwards wrote Steward that he would be at the Atlantic Hotel, Chicago, at ten o'clock August 26; that he met Steward at the Hotel and gave him his letters and guaranty, and Steward said they would go to the bank and get the money; that they went out on the street and a man told him he had the smallpox; that Steward said the man was a health officer and he would have to go with him; that the man took him to the Leonard Institute in the Auditorium Building; that a man there told him he had smallpox and would have to go to the Detention Hospital for six weeks, but he would cure him in five or six days for \$500, and thereupon he gave a check to Walters for that sum, as before stated. The only evidence tending to connect Steward with the Leonard Institute was copies of letters made by Foulkes and his testimony that Steward, August 27, 1901, said that he owned the Leonard

attesting their credibility. The verdict for the plaintiff as
to this claim is, in my opinion, clearly against the evidence
and the trial court should, in this regard, have granted a new
trial.

Another part of the testimony was for \$200 paid by
plaintiff by check to the order of A. J. Williams, Treasurer, dated
August 20, 1903. Plaintiff testified that August 20, 1903,
Stewart gave him a written authority to give him or return the
money, that he was not in Chicago between August 20, 1901, and
August 20, 1903; that August 7, 1903, he wrote Stewart, de-
claring him as a bankrupt; writing would never return \$200
for a check for \$200, a check dated for \$200, and \$200 in cash
plus what I was at your office, and you would give me out of my
check; that I was at the office; that in January 1904
wrote him that if he would send it to the Chicago Bank
there all their correspondence and the amount of payment
he would return the money back; that he returned money
Stewart that he would be at the Atlanta Hotel, Chicago, at the
Atlanta August 20; that he was Stewart at the hotel and gave
him his letter and money, and Stewart said they would go to
the bank and get the money; that they went out on the street and
a man told him he had the money; that Stewart said the man
was a credit officer and he would have to go with him; that
the man took him to the Stewart's residence in the Auditorium
Building; that a man there told him he had the money and would
have to go to the Detention Hospital for his money, but he
would come him in five or six days for \$200, and thereupon he
gave a check to Williams for that sum, as before stated. The
only witness coming in contact Stewart with the money in-
cluded was copies of letters made by Williams and his partner
Thos. Stewart, August 27, 1901, and that he owned the money.

Institute, and that he then saw Walters in Steward's office, and that Steward then gave him a printed slip bearing the name of the Leonard Institute, Leonard president and Walters treasurer. Neither the guaranty nor any originals of the letters above referred to were produced by Foulkes, but he produced what he testified were copies of the guaranty and of his letters to Steward and of Steward's letters to him, and on his statement that the originals of Steward's letters were returned to him August 26, 1903, the copies were admitted in evidence. Steward testified that he did not give Foulkes any guaranty nor write or receive the letters mentioned by Foulkes in his testimony. We think the clear preponderance of the evidence is that Foulkes was in Chicago several times between August 27, 1901, and August 26, 1903; that he was in Steward's office July 28, 1902, was then operated on for hemorrhoids by Dr. C. S. Steward and gave F. M. Steward a check for \$210; that he was again in Steward's office August 4, 1903, and then gave him the note for \$150 referred to in the letter of Ellen G. Roberts introduced in evidence by Foulkes; that he was in the People's Drug Store August 5, 1903, and then handed the proprietor, Moraba, a prescription of Dr. Steward of that date.

The copies which Foulkes testified he made of Steward's letters to him and of his letters to Steward are of little value as evidence tending to corroborate his testimony, for the only evidence tending to show that such copies are copies of original letters is the testimony of Foulkes. He also introduced in evidence a letter purporting to be a letter from Steward to Salem Baker, Hampton, Iowa, dated August 27, 1907, which, if genuine, was well calculated to prejudice the jury against Steward. He testified that the letter was signed by Steward;

10-11-41

that it was handed to him at Danbury by a man whose name he could not remember and whose place of residence was unknown to him. Against this testimony was the testimony of defendant Steward, of O. S. Steward, his brother, of Miss Roberts and of Marshall D. Mwell, an expert in handwriting, that the letter was not signed by Steward. We think this evidence shows that the letter was not signed by Steward, and therefore does not tend to prove plaintiff's case.

Again, it is to be noticed that while plaintiff in his special count alleged the payment of \$450 in currency, the giving of a check for \$350, of a sight draft for \$210 and the stealing of \$150, he made no mention of the giving of a check for \$500. We think that the evidence shows that while at the Leonard Institute Foulkes gave a power of attorney to Leonard, its president, authorizing Leonard to act for Foulkes "in an alleged conspiracy or blackmailing scheme of Lodavine Miller and Dr. F. M. Steward * * * by which I pay money to said Lodavine Miller and said Steward." We think the finding as to the \$500 paid by plaintiff to Walters, treasurer, is against the clear preponderance of the evidence, and for that reason also a new trial should have been granted.

The Court gave for the plaintiff the following instruction:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury. And the law is that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced merely because of numbers. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence, or lack of intelligence, and from all the other surrounding circumstances apparent on the trial, determine which witnesses are the more worthy of credit, and to give them credit accordingly."

"The tests by which the direct testimony of witnesses should be weighed by the jury are given by one of the most philosophical of writers upon the law of evidence, as follows: 'The credit due the testimony of witnesses depends upon, first, their honesty; secondly, their ability; thirdly, their numbers and the consistency of their testimony; fourthly, the conformity of their testimony with experience; and fifthly, the coincidence of their testimony with collateral circumstances.'" 1 Starkie 544.

The instruction in question omits the important element of the number of witnesses, the consistency of their testimony, its conformity with experience and its coincidence with collateral circumstances. In *Lyons v. Ryerson*, 242 Ill. 409, where, as in this case, plaintiff's case rested largely on his own testimony, and more witnesses testified for defendant than for himself, it was said of an instruction given for the plaintiff:

"It advised the jury that the preponderance in a case 'is not alone determined by the number of witnesses', and then follows an enumeration of the matters proper to be considered by the jury, omitting, however, the number of witnesses testifying for and against. * * * In view of the fact that the appellee's case rested very largely upon his own testimony and that more witnesses testified for appellant than for himself, this instruction might have misled the jury on this point."

The judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

418 - 17957

JOHN S. WOODRUFF,
Appellant,

vs.

MARY JORDAN et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

182 I.A. 217

PRESIDING
MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by Woodruff, the complainant in a bill to foreclose a trust deed in the nature of a mortgage made by appellee Mary Jordan, from a decree dismissing the bill for want of equity on the ground that the notes secured by the mortgage were given for usury. The mortgage was made March 16, 1907, by Mrs. Jordan to secure her twelve notes of that date, payable to her own order and by her endorsed, eleven thereof for \$50 each, payable at different times during the eleven months after their date, and one for \$1801.50, payable one year after date, all with interest from date at seven per cent. The loan was obtained by Mrs. Jordan through Flack & Co., and her contention is that the notes given by her were for the most part for usury in previous loans obtained by her through Flack & Co. She borrowed in March, 1905, \$650 from Sidney Bloss and paid part of the notes given for the loan to Flack & Co. She borrowed from or through Flack & Co. \$350 May 23, 1905, and made her twelve other notes, eleven for \$25 each and one for \$327.50. March 19, 1906, after she had paid said eleven notes last mentioned and interest at seven per cent. on her note for \$327.50 for one year, she borrowed a further sum of \$350 from or through Flack & Co. and gave her twelve other notes, eleven for \$50 each and one for \$1450, with interest at seven per cent. Before March 16, 1907, she paid said eleven notes for \$50 each

and then gave the notes and trust deed to secure the same in question in this proceeding. She testified that she then borrowed \$400 of Flack & Co.; that she received the check of complainant Woodruff for \$2351.50; that she endorsed the check and returned the money to the cashier of Flack & Co., who gave her her note for \$1450 and \$400 in currency, and that she owed one year's interest on the note for \$1450. The note for \$1450 given March 19, 1906, was on March 19, 1907, owned by Etta Gray, a customer or client of Flack & Co.

The case turns on the point, were the note and mortgage given March 17, 1907, given for a new loan by Woodruff to Mrs. Jordan or in part for the amount due Etta Gray on a former loan. If the latter, then there is evidence tending to show that the transaction was usurious. The case is not one where a person deposits money with a mortgage broker to loan for him. Woodruff made his check for \$2351.50 to the order of Mary Jordan and she endorsed the check and received the proceeds. There is no evidence tending to show that Woodruff had any knowledge of the previous transactions with Flack & Co. or Bloss. We think that Flack & Co. were not the general agents of Woodruff, but that their relations to him were those of brokers engaged in loaning money and that they were entitled to receive a commission from Mrs. Jordan without rendering the transaction usurious. This was the conclusion reached by the Master and stated by him in his original report.

The Court of its own motion ordered that the cause be rereferred to the Master with directions to make a supplemental report on the evidence already offered showing a statement of each loan made by Mary Jordan in debit and credit form, and to report the amount received by her and the amount paid by her on

and then gave the money and power bond to secure the same in
question is this proceeding. The defendant told him that he
would have it from \$100; that she received the check of com-
plaintant for \$100.00; that she received the check and
returned the money to the cashier of Bank & Co., and that he
gave him the \$100 and \$100 in currency, and that she would not
return the money on the date for \$100. The date for \$100 was
March 19, 1906, was on March 19, 1906, given by Bank & Co., a
statement of client of Bank & Co.

The case came on the point, were the facts and what
was given March 17, 1906, given by a man from Woodbury
in fact, Jordan or in part for the money was this fact on a 7-
th day. If the latter, then there is evidence tending to show
that the defendant was negligent. The case is not one where
a person who gave money with a mortgage to him to him
defendant made his check for \$100.00 as the order of Bank & Co.
and she endorsed the check and received the proceeds. There
is no evidence tending to show that Woodbury had any knowledge
of the proceeds of the sale of the property.

It is that Bank & Co. were not the general agents of Woodbury,
but that their relations to him were those of agents engaged in
lending money and that they were entitled to receive a commis-
sion from the money without paying the defendant's costs.
This was the conclusion reached by the Justice and upheld
by him in his original report.

The Court of its own motion ordered that the case be
remanded to the Court with directions to take a supplemental
verdict on the evidence already offered showing a statement of
each fact made by Henry Jordan in 1905 and 1906, and to
report the amount received by him and the amount paid by him on

account of all of said loans. The Master by his original report in effect found and reported that the Woodruff notes and mortgage were given for a new loan and not in whole or in part for the balance due on previous loans. The order rereferring the cause did not sustain the exceptions of Mrs. Jordan to the report on the ground that the Master found that Flack & Co. acted as loan brokers in the transactions between complainant and Mrs. Jordan; and did not find that the complainant Woodruff was chargeable with knowledge of the usurious interest received by Flack & Co. from Mrs. Jordan, or sustain any of the exceptions to the Master's report, but merely ordered the Master to state the amount received and paid by Mrs. Jordan on account of all of the loans made by her. We concur in the conclusions and recommendations stated by the Master in his original report, and the decree will be reversed with directions to enter a decree overruling the exceptions of Mrs. Jordan to the original report of the Master and entering a decree in accordance with the recommendations of the original report.

REVERSED AND REMANDED

WITH DIRECTIONS.

429 - 17969

ANNA GROSSMANN ,
Appellee,

vs.

FRANK GROSSMANN,
Appellant.

)
)
) APPEAL FROM CIRCUIT COURT
) OF COOK COUNTY.
)

182 I.A. 218

This was a bill in chancery by appellee against appellant for separate maintenance. The answer put in issue the material averments of the bill. The cause was referred to a Master to inquire and report as to the value of defendant's estate and what would be reasonable to allow complainant for her support. The Master took testimony as required by the order of reference only and took no testimony in support of the allegations of the bill as to the conduct of defendant towards complainant or to show that she was entitled to a decree for support and maintenance. The transcript of the record contains no evidence other than that taken by the Master. The decree directs the defendant to pay to complainant five dollars per week for her support. It is assigned for error that there is no evidence to sustain the decree.

MR. PRESIDING JUSTICE BAKER

DELIVERED THE OPINION OF THE COURT.

It is a general rule that in chancery a party in whose favor a decree is rendered, to sustain it on appeal, must in some way preserve the evidence or the decree must find the specific facts proved on the hearing. This rule applies to a decree for separate maintenance. *Berg v. Berg*, 223 Ill. 209. No presumption will be entertained that evidence sufficient to sustain the

1821A.218

ON COOK COUNTY.

APPEAL.

This was a bill in chancery by appellee against ap-
 pellant for specific performance. The answer and in answer the
 material averments of the bill. The answer was returned in a
 denial to impede and to set at naught the value of defendant's as-
 sertions and that would be reasonable to allow compensation for her
 efforts. The master took testimony as required by the order of
 reference only and took no testimony in support of the alleged
 facts of the bill as in the account of defendant's alleged con-
 sideration on the whole that she was entitled to a decree for spe-
 cific performance. The statement of the record contains
 no evidence other than that taken by the master. The master
 directs the defendant to pay to complainant five dollars per
 year for her support. It is assumed that there is no
 evidence in relation to the master.

MR. JAMES L. LUTHER, COUNSEL

DEFENDERS THE OPINION OF THE COURT.

It is a general rule that in chancery a decree in favor
 of a party is rendered, so much as it is an equity, when in
 fact the party has the evidence on the facts and that the specific
 facts proved on the hearing. This rule applies to a case for
 specific performance. But in this case the master's find-
 ings will be set aside and the evidence will be taken in the

decree, not appearing in the record, was heard, and if the evidence is not properly preserved the decree will be reversed on appeal. *Berg v. Berg*, supra. The decree finds that: "The allegations of the bill of complaint are true as therein stated." Such a finding is but a conclusion, and is not sufficient, under the decisions of the Supreme Court, to supply the place of a certificate of evidence. *Torsell v. Riffert*, 207 Ill. 621. The complainant has failed to preserve the evidence on which the decree is based, and for that reason the decree must be reversed.

REVERSED AND REMANDED.

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... by ...

... and ...

489 - 18029.

(Baker, P.J.)

BERT E. MANVILLE,
Appellee,

vs.

THE KING-RICHARDSON CO.,
Appellant.

CONSOLIDATED WITH

490 - 18030.

ROBERT E. TROSPER, JR.,
Appellee,

vs.

THE KING-RICHARDSON CO.,
Appellant,

AND

491 - 18031.

CHARLES E. REY,
Appellee,

vs.

THE KING-RICHARDSON CO.,
Appellant.

182 I.A. 224

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

These cases present the same questions. Each appellee filed his bill in equity against The King-Richardson Company, a decree was entered in his favor and from such decrees defendant appealed. The defendant company was engaged in selling books by subscription. It employed each of the complainants as a department manager, the territory in which it sold books was divided between them and to each was given the exclusive right to sell for the company in the territory assigned to him. Each of the complainants had a written contract with defendant, by the terms of which his employment began January 1, 1908 and ended December 31, 1910. The complainants employed field managers who employed canvassers to sell the books. The men employed by the department managers were required to give security to cover money advanced and merchandise shipped to them. The entire

1992. 4. 12 81

THE KINGDOM OF SWEDEN
MINISTRY OF FOREIGN AFFAIRS
Stockholm, Sweden
1945

THESE ARE THE RESULTS OF THE INVESTIGATION.

There are still in effect against the King's Highway Company.

The above was stated by the Mayor and Town Clerk before the

of the complainant had a written contract with defendant, by which defendant agreed to sell her the company in the territory assigned to her. Defendant divided between them and to each was given the exclusive right to represent defendant in the territory. Defendant also gave each a separate number, the territory in which it sold books was books by subscription. It engaged each of the complainants as an agent. The defendant company was engaged in selling

the terms of which his employment began January 1, 1938 and which terminated on May 1, 1941. The employment was for full time and the employee was paid \$2.00 per hour. The man engaged in the department was required to give monthly to the department money advanced and returned to him. The entire

expense of the business was borne by the three department managers in the proportion that the total net sales of each for the year bore to the total sales of all. The defendant was paid by Trosper and Manville thirty-nine per cent. and by Ely forty-two per cent. of the retail price of the books sold. Each of the complainants received as an advance \$150 per month. Defendant agreed to furnish to each department manager by October 25 of each year a statement showing accounts to October 1 and thereafter by the 25th of each month statements showing accounts up to the 1st of the month until all the business of the fiscal year was closed. The contract provided that in stating the account for the year each manager should be charged with his salary, all advances to him for personal expenses and all salaries, allowances, etc., paid to employees in the sales department of his department, with the salaries of stenographers and other office assistants engaged in his department, with all supplies, postage, etc., used in the conduct of the business of his department and with that proportion of the total expense of the Chicago office, including rent and the auditing and shipping department as his total net sales for the year bore to the total net sales of all the departments of the Chicago office. The contract also provided that a department manager should be entitled to any excess of his receipts and credits over the charges against him and that the amount of such excess should be immediately due and payable to him. The complainants had been employed as department managers in 1907 under contracts similar in their provisions to the contract of 1908, 9 and 10. They were discharged by defendant July 16, 1910 and filed the bills in these cases July 29, 1910 praying for an accounting by defendant as to the business done in 1907, 8 and 9. The decree in the Ely case gives complainant a decree for \$1064.33 for moneys collected by defendant belonging

expense of the business was borne by the three department man-
 agers in the proportion that the total net sales of each for the
 year bore to the total sales of all. The distribution was made
 by Treasurer and Executive Vice-President per month, and by the 15th
 day of each month of the retail sales of the month. Each of
 the department managers was an authorized signatory, and each
 was allowed to transfer to each department manager by check or
 of such bank a statement showing amounts in interest and there-
 after by the 15th of each month. Amounts were not
 to be paid at the bank until the 15th of the month.
 was closed. The department manager had to submit the account
 for the year each manager would be charged with the sales, all
 expenses as his for personal expenses and all salaries, allow-
 ances, etc., paid to employees in the sales department of his
 department, with the salaries of stenographers and other office
 assistants engaged in his department, with all supplies, postage,
 etc., used in the conduct of the business of his department and
 with the proportion of the total expense of the business which
 pertaining to and the salaries and shipping expenses as the
 total net sales for the year bore to the total net sales of all
 the departments of the business. The department manager provided
 that a department manager should be entitled to any amount of his
 personal and family expenses over the charges against him and that the
 amount of such expenses should be immediately due and payable to
 him. The department manager had been employed as department manager
 in the same business since the time previous to the con-
 sideration of 1907, 1908 and 1909. They were distributed by department, this
 was the basis for the sales in each year 1907, 1908 and 1909.
 for the accounting by department as to the business done in
 1907, 1908 and 1909. The answer is that the sales given contained a
 balance the right of the money collected by department belonging

to complainant, decrees that defendant deliver to him thirteen promissory notes amounting to \$489.64 and assign to him over 200 accounts amounting to more than \$10,000; that in the Manville case gives complainant a decree for \$761.35, orders one note to be delivered to him and nearly 200 accounts to be assigned to him, and that in the Trosper case gives complainant a decree for \$1276.10, orders 36 notes to be delivered and 250 accounts to be assigned to him. The complainants had prior to their discharge organized a corporation called the W. E. Richardson Company to engage in the same business as defendant company was engaged in.

MR. PRESIDING JUSTICE BAKER

DELIVERED THE OPINION OF THE COURT.

The rule was laid down by Lord Medesdale in O'Connor v. Spaight, 11 Schoales and Lefroy in 1804, that it is a sufficient ground for jurisdiction in equity that the accounts are too complicated to be taken at law. In Foley v. Hill, 2 H. L. Cases 28, the rule is clearly recognized that the chancery courts will take accounts when complicated independently of all other equities. See also, Fenno v. Hoffman, 116 Fed. Rep. 49 and cases there cited. Where a salary is to be paid to an employee in proportion to the profits of his employer the question whether the employee may maintain a bill for an accounting depends on the circumstances whether the accounts are of a too complicated nature to be gone into by a jury. Ruel v. Selz, 5 Ill. App. 116; Harrington v. Churchward, 6 Jur. W. S. 578; U. O. 8th W. R. 302; Hargrave v. Conroy, 4 C. E. Green 281; Alpaugh v. Wood, 45 N. J. Eq. 155. In Shannon v. Steward, 108 Ill. 541, an employee was to be paid a certain sum and one-half the net profits of a branch of the employer's business, and it was held he could maintain a

bill for an accounting although he was not a partner.

It is clear from the nature and extent of defendant's business that an account taken under the provisions of the contract with complainants respecting their compensation for three years would be complicated, intricate and a wholly unfit matter for investigation by a jury.

That the defendant was indebted to complainants in the amount of the decrees for moneys collected after it received all that it was entitled to for the books sold in 1907, 8 and 9 is not disputed; nor is it disputed that the defendant had no pecuniary interest in the promissory notes ordered to be delivered or the accounts ordered to be assigned to complainants. Appellant's contention is that under the contract the notes and accounts belonged to it and complainants had no right to either but only to the money due on the same when collected by defendant and further, that if the notes were to be delivered to complainants, as provided in the decree, they should be endorsed "without recourse" which was the only endorsement the complainants were under any circumstances entitled to. Appellant insists that it had an interest in the notes, accounts and correspondence beyond their mere money value; that an important part of its assets and business consisted of the good will and its relations with its field managers and canvassers; that with the possession of the notes and accounts complainants would be in a position to compel defendant's canvassers to do business with them rather than with appellant and thereby would be enabled to seriously injure the business of appellant. We concur in the contention of appellant that under the provisions of its contract with complainants it had the right to retain the notes and accounts as its own and collect the same, and that the only right the complainants had in such notes or accounts was the right to the money due thereon

Bill for an accounting although he was not a partner.
It is clear from the nature and extent of defendant's
business that he should have made the provision of the law
which will compensate creditors. That compensation for their
losses would be compensated, insured and a daily profit made.
The business of a bank.
That the defendant was indebted to complainant in the
amount of the money for money collected after it was received and
that it was entitled to for the money said in 1897, 1898 and 1899
and 1900; and it is claimed that the defendant had no
presently interest in the property which was to be delivered
by the account entered to be assigned to complainant. Appellant's
position is that under the contract the money was assigned to
him and he was entitled to it and complainant had no right to it but only
to the money due on the note then collected by defendant and
turned, that if the note was to be delivered to complainant,
as provided in the contract, that would be without "without re-
course" which was the only endorsement the complainant gave money
but complainant entitled to. Appellant insists that it had no
interest in the note, assets and other property of the bank
and that the value of the note was the value of the note and that
the complaint of the bank with the relation with the field
was not a complaint; that with the possession of the note
and assets complainant would be in a position to receive the
bank's assets to its business with them rather than with
appellant and thereby would be enabled to properly insure the
business of appellant. It seems to me that the complaint is
that the bank was entitled to the money and the complaint is
that the right to receive the note and assets as its own and
to sell the same, and that the only right the complainant has
in such notes or accounts was the right to the money due thereon

when collected and it follows, that in our opinion, the court should not have ordered the defendant to turn over the notes and accounts to complainants. But we do not think that the decree should be reversed because of the direction that defendant turn over such notes and accounts to complainants. The period for which defendant was required to account ended four years ago and defendant has, by virtue of the appeals, retained possession of the notes and accounts. We cannot see how defendant can be prejudiced by now turning over the notes and accounts to complainants.

August 13, 1910 the complainants moved for an interlocutory order that defendant turn over to them the notes and accounts in question and the motion was referred to a master to take and report proofs with his conclusions and recommendations. Pursuant to this order proofs were taken in one case to be read in each case. January 17, 1911 a general order of reference to the same master was made in each case and the parties stipulated that the proofs taken on the reference should stand as proofs under such general order of reference and they were so considered by the master and reported by him as the proofs in the case. The court adjudged the costs against defendant and allowed the master in each case \$183.33. We do not think that the court erred in including in the master's costs the cost of taking proofs under the reference on the motion.

We think that the decree should have provided that the notes should be endorsed "without recourse" before delivered to the complainants.

The decree in each case will be modified by inserting therein after the words: "that the defendant deliver to the complainant all the notes set forth in the master's report" the words, "which notes shall be endorsed 'without recourse' by the

and defendant and its witness, that in our opinion, the court
should not have ordered the defendant to turn over the notes and
documents in question, but we do not think that the court
would be reversed because of the decision that defendant gave
very little notice and documents in question, the period for
which defendant was required to submit notes that were not
defendant's, by virtue of the specific, retained possession of
the notes and documents. It seems to me that defendant was not
deprived of any material thing and was not prejudiced in any way,
because it, like the defendant, never for an instant
contended that defendant had any right to the notes and documents
in question and the notes were referred to a master to take and
report facts with his conclusions and recommendations. Turning
to this other ground, there seems to me to be no merit in such
claim. January 19, 1911 a general order of reference in the case
was made and made in such case and the parties stipulated that the
facts taken on the reference should stand as facts under such
general order of reference and they were so conducted by the
master and reported by him as the facts in the case. The court
dismissed the notes against defendant and allowed the master in
such case (Jan. 19). We do not think that the court acted in making
that is the master's notes the case of taking facts under the
reference on the master.
We think that the issue should have proceeded that the
notes should be returned "without prejudice" before delivery to
the defendant.
The master in each case will be notified by the court
in writing after the master "that the defendant deliver to the
plaintiff all the notes and facts in the master's report" the
notes, "which notes shall be returned 'without prejudice' by the

-6-

defendant", and as modified the decree in each case will be affirmed.

DECREE IN EACH CASE MODIFIED
AND AS MODIFIED AFFIRMED.

RECEIVED

ber Term, 1911. No.
18 - 17423

HENRY SMITH,
Defendant in Error,

vs.

HENRY H. ROBERTS,
Plaintiff in Error.

)
)
) ERROR TO THE MUNICIPAL COURT
)
) OF CHICAGO.
)

182 I.A. 227

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This writ of error has been sued out to reverse a judgment of the Municipal Court in favor of the defendant in error here, the plaintiff below, Henry Smith, against the plaintiff in error here and defendant below, Henry H. Roberts. The judgment is for \$512.33 and costs. Its basis was the following promissory note:

"Chicago, June 31, 1910.
\$500.00. Two months after date I promise to pay to the order of Henry Smith Five Hundred and no/100 Dollars at 120 Franklin Street.

Value received.
With interest at 6 per cent. per annum.
H. H. Roberts."

The execution of the note is admitted by the defendant. It was given for a sufficient consideration, thus expressed in a contemporaneous agreement executed between the plaintiff and defendant:

"This indenture made this 21 day of June, 1910, between H. H. Roberts * * * and Henry Smith * * * witnesseth:

Whereas said parties have for some time past carried on the business of publishing * * * under the provisions of Articles of Partnership heretofore entered into * * * and whereas it has been agreed by and between said parties to dissolve said partnership * * * now this Indenture Witnesseth: that in pursuance of said agreement in this behalf the said parties do hereby declare that the partnership between them shall be considered as determined and stand dissolved as and from this date; and that in pursuance of said agreement and in consideration of the premises and of the sum of Fifteen Hundred Dollars now paid by said party of the first part to the party of the second part, said party of the second part does hereby assign

Exhibit 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

4881A.227

THE FOLLOWING IS A SUMMARY OF THE FACTS AND CIRCUMSTANCES OF THE CASE:

This case arises out of a contract for the sale of certain real estate. The contract was made on the 1st day of January, 1911, between the Plaintiff and the Defendant. The contract provided that the Defendant should sell to the Plaintiff certain real estate situated in the County of ... State of ... for the sum of \$10,000.00. The Defendant failed to perform the contract, and the Plaintiff brought this action to enforce the same.

The Defendant claims that the contract was void because it was made in violation of public policy. The Plaintiff claims that the contract was valid and enforceable. The Court has found in favor of the Plaintiff, and has ordered the Defendant to perform the contract.

The Court has also found that the Defendant is liable for the costs of this action. The Court has ordered the Defendant to pay the costs of this action to the Plaintiff.

This judgment was made on the 1st day of June, 1911, by the Court. The Court has signed this judgment, and it is now a part of the record of this case.

and transfer unto the party of the first part, his executors, administrators and assigns all the part or share and interest whatsoever of him in and to all and singular the premises and property heretofore mentioned, including the sole right to continue the business, publishing said lists, all credits, contracts, assets, effects and good will of said partnership, to hold all of the said premises unto the said party of the first part, his executors, administrators and assigns absolutely and forever, also specifically including contract of A. C. Atkins & Co. of Indianapolis for \$1000.00 for space in Roberts Hardware List, also Champion Tool Works contract for one year (two pages) in American Machinery Bulletin, also Kern Machine Tool Works Co. contract for 3 months."

There are other recitals and provisions in this contract of dissolution, but the foregoing is all that it is necessary to quote.

The \$500.00 note was part of the \$1500.00 consideration mentioned, the remainder having been paid in cash.

The defence made to the suit on this note was and is "that the consideration for said note has failed in that the plaintiff has not turned over to or delivered to the defendant", the Atkins & Co. contract and the Champion Tool Works contract; and a claim in set-off thus set forth:

"This defendant further states that by reason of the failure of said plaintiff to deliver said contracts for advertising as agreed in said written contract * * * he has lost the profit from said advertising contracts, and that he has been otherwise damaged, whereby said plaintiff is now indebted to this defendant as follows:

Loss sustained by reason of the failure to deliver the Atkins contract (35% on the \$1000.00 contract) \$350.00.

Loss sustained by reason of the failure to deliver the Champion Tool Works contract, 200.00
Total amount of set-off..... \$550.00."

This defence seems to us based on a confusion between "a contract" and the written memorandum or evidence of a contract. We should be unable to see any failure of consideration for this note, even if the contention of the defendant that the written evidences or memoranda of the two contracts mentioned were wrongfully or neglectfully withheld from him by the plaintiff, were borne out by the evidence.

The five hundred dollar note was given as part of the consideration for Smith's interest in the partnership of Roberts & Smith, and the very memorandum of contract between Roberts & Smith produced in evidence by Roberts shows the transfer and conveyance to him of that interest, specifically including Smith's interest in the Atkins Company and Champion Company contracts. This consideration has not failed. Smith has no longer any interest in the business or in any of the contracts made in the course of it or for its benefit. The business and the contracts all belong to Roberts.

It might well be that if Smith interfered with the realization by Roberts on those contracts, if he prevented in any manner the delivery to Roberts or his use of evidence of them, written or otherwise, or even if he merely neglected to carry out a promise he made collateral to the contract of dissolution and conveyance, to obtain and deliver to Roberts the written evidence or memoranda of the particular advertising contracts mentioned, there would be a set-off available to Roberts of the damages caused by such wrongdoing or default on the part of Smith.

But the burden of proving such a set-off would be on Roberts entirely. To receive its benefit, he must establish the existence of the written instruments the non-delivery of which is complained of, the undertaking of Smith to deliver them or to secure the delivery of them to him, the default in that undertaking, and the resultant damages.

The evidence in this case fails entirely to establish any such series of essential factors to the set-off claimed. This is our conclusion after a careful consideration of all the evidence received by the Court below. It would be useless to discuss it in detail. We agree with the view of it evidently

The five hundred dollar note was given as part of the consideration for Smith's interest in the partnership of Robert and Smith, and the very substance of the partnership was the fact that Smith possessed the business of Robert and Smith. Smith's interest in the partnership was not a mere right of participation in the profits of the partnership, but a right of ownership in the partnership. This consideration was not valid. Smith has no longer any interest in the partnership as a result of the partnership. In the course of it or for its benefit. The business was the partnership all being in Robert.

It might well be that if Smith intended to give the partnership to Robert on these conditions, it is necessary to consider the delivery to Robert of the note of delivery of the partnership to Robert, or even if he merely intended to give out a promise to make delivery to the partnership of the partnership and partnership, to deliver and deliver to Robert the partnership as a partnership of the partnership. Smith's intention to deliver the partnership to Robert would be a self-delivery to Robert of the partnership caused by such delivery of delivery to the partnership of Smith.

But the burden of proving such a self-delivery would be on Robert entirely. To receive the partnership, he must establish the delivery of the partnership to the partnership of which he is a partner. The partnership of Smith to deliver to him as a partner of the partnership of Smith to him, the partnership in that partnership, and the partnership.

The evidence in this case fails entirely to establish any such delivery of partnership to the partnership of which he is a partner. This is our conclusion after a careful consideration of all the evidence received by the Court below. It would be necessary to discuss it in detail. It seems that the view of it is entirely

taken by the Judge of the Municipal Court, who tried the cause without a jury. He must be assumed to have held effective only that part of it properly admissible.

But whether that objected to by the defendant is taken into account or rejected, the result, to our mind, is the same.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

er Term, 1911, No. 1

CARMELO UMINA,
Defendant in Error,

vs.

H. D. MORELAND COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

182 I.A. 236

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This is a writ of error sued out to reverse a judgment of the Municipal Court of Chicago for \$600.00 against the plaintiff in error, the H. D. Moreland Company, in favor of the defendant in error, the plaintiff below, Carmelo Umina.

The defendant company is a building contractor. It was on and before May 10, 1910, erecting a three story flat building of brick on Bekeley street in Chicago. The plaintiff Umina was employed as a laborer on this job on the day mentioned and had been for three weeks at least preceding that day. His work consisted of wheeling barrows filled with mortar for the use of the masons from the ground into the building to a hoist therein. The runway over which the barrows were wheeled was a short single plank fourteen inches wide running from the mortar box on the ground to a wooden horse of some kind nearer the building, and another single plank of the same width and twenty-five feet long, running from the horse up to the sill of the door of the first floor of the building about nine feet above the ground. This method of having the mortar brought into buildings in process of construction is a customary and usual one, and the runway was of the usual construction and width for the purpose.

On May 10, after the plaintiff had been working an hour or so, his foot slipped on the running plank near the door sill, the wheelbarrow tipped over and he fell to the

COPIES, 1111, 1112

RECEIVED

DEFENDANT IN ERROR

VS.

PLAINTIFF IN ERROR

1111, 1112

1111, 1112

THE COURT HEREIN ORDERED THE RETURN OF THE WRIT.

This is a writ of error and is returned a judgment of the Municipal Court of Chicago for \$60.00 against the plaintiff in error, the N. W. Horsford Company, in favor of the defendant in error, the plaintiff below, Chicago Union.

The defendant company is a building contractor. It

was on and before May 10, 1910, building a three story brick

building of brick on Lake Street in Chicago. The plaintiff

Union was employed as a laborer on this job on the day mentioned

and had been for three weeks at least preceding that day. His

work consisted of placing concrete filling with mortar for the

use of the masons from the ground into the building in a place

therein. The manner in which the masons were directed was a

man on the ground to a wooden horse at some kind near the

building, and another man on the same side and twenty-

five feet long, running from the horse up to the top of the

door of the first floor of the building about nine feet above

the ground. This method of having the mortar brought into

the building in process of construction is a customary and usual

way, and the manner was of the usual construction and with

for the purpose.

On May 10, after the plaintiff had been working on

hour or so, his foot slipped on the running plank near the

door sill, the workman slipped over and he fell to the

ground and was injured. The extent of his injuries is in dispute, but it is immaterial in the view we take of the case.

He sued the defendant company for damages, alleging in his "Statement of Claim" that it was liable "for negligence * * * in not furnishing him with a safe place to work and safe appliances with which to work", in that the runway was "too narrow and too steep and partly covered with mortar" and for negligence through the violation of what the statement very inartificially describes as "Section 79, chapter 48, page 1047, Hurd's Statutes, (1908), by which is evidently meant the Act of the Legislature of Illinois hereinafter quoted, approved June 3, 1907, entitled "An Act providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges, viaducts and other structures and to provide for the enforcement thereof." *J. & A. #25368-5377.*

The cause was tried in the Municipal Court by a Judge sitting without a jury. He found for the plaintiff and assessed his damages at \$600.00. To reverse the judgment founded on this finding this writ of error, as before noted, has been obtained. It is clear that no liability exists under the common law duty of the defendant to supply the plaintiff a safe place in, and safe appliances with, which to work, for even if its negligence could be predicated from the character of the runway or from the fresh mortar which plaintiff maintains was frequently dropping on it from the trowel work of the bricklayers above (which proposition, however, we do not hold), there can be no doubt that whatever risk of danger there was in working under the simple and apparent conditions which existed was assumed by the plaintiff, who had been long employed under them in the ordinary discharge of his duties. This is practically conceded by the plaintiff's counsel, who puts his ultimate contention squarely

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Finally, the last step in the process is to implement the plan and monitor the results. This involves putting the plan into action and tracking the progress of the solution. Once the problem has been solved, the final step is to evaluate the results and determine if the solution was effective. This involves comparing the results of the solution to the original problem and determining if the solution was successful. If the solution was successful, the final step is to document the results and share the information with others. If the solution was not successful, the final step is to identify the reasons for the failure and determine if the solution needs to be revised.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

the statement of Glavin that it was likely "for his own protection" to have been in the room at the time of the shooting. Glavin also stated that he was in the room at the time of the shooting and that he was in the room at the time of the shooting.

Statute, (1908), by which it is originally made the Act of the

1. The above information was obtained from the files of the Bureau of the Census, Department of Commerce, and is being furnished to you for your information.

1. The Commission has received information that the following persons have been identified as having been involved in the activities of the Communist Party, U.S.A., in the United States and its territories and possessions:

and is payable for the enforcement thereof." 28 U.S.C. § 2277

The record was filed in the Municipal Court at a hearing
held on March 10, 1968. The Court found the defendant guilty
of the offense and sentenced him to a term of imprisonment
in the County Jail for a period of six months.

It is clear that no liability exists under the common law with

At the defendant to supply the plaintiff a new plane in, and

... would be indicated from the character of the ...

on or it from the street with the following words (which

RECEIVED: 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 264

and the following information was obtained:

on the violation of the statute above cited. The material part of that statute reads thus:

"Be it enacted: * * * That all scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation, in this State for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure, shall be erected and constructed in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon."

If the accident to the plaintiff resulted from a violation by the defendant of this statute, it is true, as maintained by him, that the doctrine of the Assumption of Risk does not apply.

Spring Valley Coal Company v. Patting, 210 Ill.

342;

Streeter v. Western Wheeled Scraper, 254 Ill.

244.

The questions, therefore, for decision by the Court below and by us are whether there was a violation of the statute in this case and whether the accident resulted therefrom.

The plaintiff contends (a) that the runway on which he was working was a "scaffold" and was not "constructed in a safe, suitable and proper manner", nor so constructed "as to give proper and adequate protection to the life and limb of any person employed or engaged thereon", (b) that if not a scaffold the runway was at least a "mechanical contrivance" and failed of meeting the same requirements of the Statute. This failure to meet the requirements of the statute it is argued is shown by the insufficient width of the runway, and the fact that it was not protected above from the droppings of fresh mortar from the

Page 12 of 12

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...the defendant of this statute, it is true, is not

more likely to understand and be motivated by the

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object can act as an indicator of a new world, and it is not a new world.

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... and

4. Continued on the 2d page (c) Harvard Harvard Harvard

2. *Conclusions*—The results of this study indicate that the use of a single, standardized, and validated questionnaire can provide a reliable and valid measure of the prevalence of mental health problems in a community sample. The results also indicate that the prevalence of mental health problems is higher in the community than in the clinical setting. This finding is consistent with the results of other studies that have found that the prevalence of mental health problems is higher in the community than in the clinical setting. The results of this study also indicate that the use of a single, standardized, and validated questionnaire can provide a reliable and valid measure of the prevalence of mental health problems in a community sample. This finding is consistent with the results of other studies that have found that the prevalence of mental health problems is higher in the community than in the clinical setting.

trowel work going on on the walls above it. The fresh mortar dropped on it, it is maintained, caused the plaintiff's foot to slip and brought about the accident.

We assume that the Court below agreed with these contentions, but we are unable to do so. We do not think that any proper definition of "scaffold" can be made to include such a "running plank" as the one in question. We doubt much if the running plank should be considered a "mechanical contrivance." If it was neither one nor the other, the statute did not apply to it.

But even if, by the liberal construction of the statute for which the plaintiff contends, and on account of the fact that by the phrasing of the Act, "scaffolds", "cranes", "stays", "ladders" and "supports" are all apparently placed under the generic term of "mechanical contrivances" (although we should hesitate independently so to denominate some of them), we treat the runway as "a mechanical contrivance", we can not hold that for either of the reasons which the plaintiff assigns, or for any other, it was not "erected and constructed in a safe, suitable and proper manner" or was not "so erected and constructed, placed and operated as to give proper and adequate protection to the life or limb of any person or persons employed or engaged thereon."

It may be true, as the plaintiff testified, that if the runway had been made of three planks placed side by side, he would not have fallen, especially if the arrangement had included the fastening together of the planks. A wider platform of many planks would have been still safer. It may be true that a canopy or roof erected over the runway might have prevented the accident by preventing any mortar from falling on the plank, although that the plaintiff's foot slipped on fresh mortar is

...with going on on the main shore. The train was
stopped on it, it is maintained, caused the accident. It was
stopped about the accident.

It appears that the Court below arrived with great con-
fidence, but he was unable to do so. He is not likely to
make a mistake of "conflict" and he made it. He made it the
"wrong time" as the case is presented. He should have
known that he should be considered a "mechanical" person.
It is not certain one not the other, the train did not stop.

But even if, for the liberal construction of the ship-
ping law, the plaintiff contends, you are not one of the law
that is the question of the fact, "conflict", "wrong", "wrong".

"Liberal" and "wrong" are all important words which the
court has of "mechanical" construction. (Although it should
be noted incidentally as to the plaintiff's case of them), we have
the court as "a mechanical construction", we have not said that
for either of the reasons which the plaintiff makes, as for

the court, it was not reached and concluded in a case,
which was proper manner or was not "as expected and con-
sidered, placed and operated as to give proper and adequate
protection to the life or limb of any person or persons engaged
in such business."

It may be true, as the plaintiff contends, that it
the railway had been made of those places which the law
has made and have failed, especially if the arrangement had in-
cluded the following together of the places. A later finding
of fact might have been still later. It can be seen that
a company or pool should have the railway which have provided the
method by providing any water from failing on the ship,
although that the plaintiff's case should be based on these water is

rather a conjecture than a proven fact. A completely covered broad inclined plane with side walls would have been still more protected from the accident of any foreign substance upon it. But neither a wide platform nor a covered floor was, in our opinion, required by the statute under discussion. It was not absolute safety (which is rarely if ever obtainable in construction work), nor was it employees insurance that this statute was expected to secure, but that amount of protection for employees and others working or passing about a building in construction as is consistent with the practicable carrying on of the work. In construing the phrases "constructed in a safe, suitable and proper manner" and "so constructed as to give proper and adequate protection", equal weight must be given to the words "suitable" and "proper" as to "safe" and "adequate." We do not feel at liberty to hold unsuitable and improper a method of supplying mortar to bricklayers which is shown to have been the ordinary and customary one for a great number of years, and which had never before resulted in an accident in the experience of a builder of twenty-one years standing.

The judgment of the Municipal Court will be reversed with a finding of facts.

REVERSED.

...a conjecture than a proven fact. A completely covered
...plans with which would have been still
...from the accident of any foreign substance upon
...it. For without a clear relation with a certain time, it
...is not possible, explained by the absolute order of time. It was
...and absolute safety (which is rarely if ever obtained in con-
...circumstances, but not in the case of the present case, and
...the one reported in account, but that would be possible for
...and other works or research about a building in
...as is consistent with the scientific carrying on
...at the work. In considering the phrase "conducted in a safe,
...and proper manner" and "no conducted as in five years
...and absolute perfection", equal weight must be given to the
...with "absolute" and "proper" as to "safe" and "absolute". No
...is not that liberty to hold ourselves and impose a method
...of carrying out the business which is shown to have been
...the safety and security and for a great number of years, and
...which has never before existed in an accident in the experience
...at a distance of twenty-one years standing.
...The judgment of the Municipal Court will be reversed
...with a finding of those.

REVEREND.

Term, 1911, No. 1

ELLEN REAGAN,
Appellant,

vs.

ELIZABETH HOOLEY,
(now Elizabeth Morris), et al.,
Appellees.

)
) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
)

182 I.A. 250

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This cause comes to us on an amended bill of complaint filed October 14, 1903, as amended on July 14, 1904, the answer by certain adult defendants to said amended bill as amended, filed March 3, 1906, admitting all the allegations of said bill and asking the same relief asked by the complainant, the answer of certain minor defendants by a guardian ad litem, submitting their rights to the Court, the answer of the principal defendant, Elizabeth Morris, sued as Elizabeth Hooley, denying the material allegations of said bill and setting up the Statute of Frauds in an affirmative defence to the same, the Report of a Master in Chancery to whom said cause was referred (with the evidence taken by him), recommending that the bill be dismissed for want of equity, the objections to the said report, afterwards ordered by the Court to stand as exceptions thereto, the decree of the Court confirming the Master's Report and dismissing the bill for want of equity, and an appeal from said decree to this Court by the complainant, whose assignments of error amount practically merely to the complaint that the decision of the Court below should have been in her favor instead of against her.

The decree itself states material parts of the nature and history of the cause succinctly and we quote from it:

"The Court finds: that on or about June 4, 1896, one Ellen Reagan filed her certain bill of complaint herein to have a certain warranty deed declared a conveyance in trust, which said deed was made on the 12th day of May, 1896, by Mary Whouley, conveying to Elizabeth F. Hooley (Here follows a detailed description of Lot 78 in Lombard's Division of Block 50 in 19-39-14 in Chicago), which said deed was duly recorded in the Recorder's office * * on the 12th day of May, 1896. * * *

That the said Elizabeth F. Hooley has since the receiving and recording of said deed been married and is now Elizabeth F. Morris, the defendant herein. That issues were framed upon the said bill between the said Ellen Reagan and the said Elizabeth F. Morris and others, that the cause was thereafter referred to Master in Chancery John Hummer to take testimony and report the same, together with his conclusions of law and fact, and that said Master thereafter reported to this Court the evidence so taken, together with his conclusions of law and fact, which said report of the said Master recommended that a decree be entered dismissing said bill for want of equity.

That exceptions were filed by complainant * * * to said report, but that no order was entered thereupon.

That thereafter an amended bill was filed herein by the said Ellen Reagan and others, alleging the deed aforesaid was given by the said Mary Whouley to the said Elizabeth F. Hooley, now Elizabeth F. Morris, as a mortgage."

It would seem to appear from an "appendix" to the printed brief and argument presented to us by the counsel for appellant, that the filing of this amended bill was suggested in July, 1903, by a Chancellor in the Circuit Court, who, after hearing an argument on the exceptions to Master Hummer's Report on the original bill, made some observations on the evidence but refused to make any order except "Leave given to complainant to file an amended bill."

As appellees' counsel properly enough point out, however, we can find no such matter in the transcript of the record before us, and it is entirely immaterial in the present contention in any view.

After the amended bill was filed (October 14, 1903) and itself amended (July 14, 1904), it was answered by various defendants as above set forth, and on June 10, 1905, the cause was again referred to a Master, this time to Master Cooper, to take testimony and report the same with his findings and conclusions.

The complainant then offered in evidence the evidence which had been taken and reduced to writing before Master Hummer at the former reference. The following stipulation relating thereto was entered into between counsel and placed on record:

"It is hereby stipulated between counsel for complainant and counsel for Elizabeth Morris that no objections will be made to the testimony offered for the reason that it was not taken before Master Cooper, but was taken before Master Hummer, and no objection will be made because it was taken under other issues than those under which we are now proceeding, excepting counsel for Elizabeth Morris reserves the right to argue that that testimony must be interpreted in the light of its having been taken under a bill to declare a trust."

The decree finds that on May 12, 1896, Mary Wholley was unmarried; that she died June 26, 1896; that she conveyed by warranty deed the premises before described to Elizabeth F. Hoolley, now Morris, subject to a certain incumbrance on them owned by said Hoolley; that the warranty deed provided that the said incumbrance should be paid by said Hoolley; that she is still the owner of said incumbrance and is willing and consents of record to have a decree entered herein directing that said incumbrance be surrendered and cancelled and declared null and void and of no force and effect; that the said warranty deed was given for a good and valuable consideration, namely, money due to the grantee and future support for the grantor; that it was not made in trust or as a mortgage or security of any kind, but was a conveyance in fee simple, and that the title to said premises was forever thereafter to remain in and be the property of said Hoolley, now Morris.

The decree makes an order about costs and contains these further ordering clauses:

"It is therefore ordered and decreed: that the said Elizabeth F. Morris is now the owner in fee simple absolute of said premises above described in said warranty deed, by virtue of the said conveyance.

It is further ordered and decreed: that the original bill herein filed, the amended bill and all amendments thereto be dismissed for want of equity."

The complaint then offered in evidence the evidence which had been taken and reduced to writing before Justice Barrett as the Court's findings. The following statement was made: There was entered into between counsel and placed on record:

"It is hereby stipulated between counsel for complainant and counsel for defendant that no testimony will be made to the testimony offered for the reasons that it was not taken before Justice Barrett, but was taken before Justice Barrett, and no objection will be made because it was taken under other laws than those under which the now proceeding, executed counsel for defendant herein reserves the right to argue that testimony must be introduced in the light of the having been taken under a bill to declare a trust."

The above finds that on May 12, 1904, the complainant was married; that she died June 24, 1905; that the conveyance by warranty deed the premises before described to Elizabeth A.

Hosley, now Morris, subject to a certain incumbrance and then owned by said Hosley; that the warranty deed provided that the said incumbrance should be paid by said Hosley; that she in turn

the owner of said incumbrance and is willing and consents to record to have a notice entered herein directing that said incumbrance be extinguished and cancelled and declared null and

void and of no force and effect; that the said warranty deed was given for a good and valuable consideration, namely, money due to the grantee and future support for the grantor; that it

was not made in trust or as a mortgage or security of any kind, but was a conveyance in fee simple, and that the title to said premises was forever thereafter to remain in and be the property

of said Hosley, now Morris. The above makes an order of the Court and contains these further findings of fact:

"It is further found and decreed that the said Elizabeth A. Morris is the owner of the premises before described in said warranty deed, by virtue of the said conveyance. It is further ordered and decreed that the said bill be dismissed for want of equity."

The first of these decretal orders is manifestly out of place in a technical sense, for there is no cross-bill asking affirmative relief on the part of the defendant, and the dismissal of the original and amended bills leaves the Court without jurisdiction to make any order on the subject matter outside of the ordinary orders about costs.

But in view of the findings of the decree, which are proper as the basis of dismissal, and which would have by themselves the same effect as establishing res adjudicata in subsequent litigation, this technical error is hardly worth attention.

The real question at issue is whether the Court erred in sustaining the Master's Report to the effect that the warranty deed was not given as a mortgage and in consequence dismissing the amended bill for want of equity. We think it did not. Consideration of the evidence convinces us that the Master was right in his findings of fact that the consideration for the making of said warranty deed was the satisfaction of the amount of money which Mary Whouley owed Elizabeth Hooley and also the advancement of other sums of money by Elizabeth Hooley for the care and keeping of Mary Whouley, and the undertaking of said Elizabeth Hooley to keep said Mary Whouley while she lived and pay her living expenses, and that the deed was the free act of Mary Whouley to the said ends, and was not given as security or in trust for any purpose. If the Master was thus right in his conclusions of fact, his conclusion of law that the bill should be dismissed for want of equity manifestly follows.

The contention of the complainant is that the warranty deed in question was meant by Mary Whouley only to secure said Elizabeth Hooley for such advances as the said Hooley had made

The trial of these documents is not only of
value as a historical source, but there is no other - still more
attractive trial on the part of the Government, and the
of the original and amended bills leaves the Court without the
evidence to make any error in the various matters of
the ordinary course of cases.

But in view of the findings of the Court, which are
based on the basis of historical, and which would have been
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and should make to or for said Whouley and with the purpose (to quote from the bill) that the "described real estate and the proceeds thereof after the payments of all the accounts so advanced to said Mary Whouley * * might be divided among the heirs at law of said Mary Whouley", of whom the complainant, Ellen Reagan, is one, and the defendants, including Elizabeth Hookey, are the others. The complainant alleged in her amended bill that the property in question was worth \$5000 and that the defendant, Elizabeth Hookey, had collected \$1000 for rent from the premises since June 12, 1896, and that after the payment of all the advances, which it was alleged Elizabeth Hookey said amount to \$1600, and on an account of the rents received, "there will remain a large sum as the equity, to-wit: Three Thousand Dollars, of which the oratrix is entitled to her legal share".

Somewhat inconsistently, further allegations of the bill assert that although Elizabeth Hookey has acknowledged that she holds the said real estate in trust for heirs at law of Mary Whouley, she has on demand refused to account for rent receipts from it "or to pay the oratrix her share of the said property, but on the contrary now declares that the said property is absolutely and legally hers and that she intends to withhold from your oratrix any and all share in the said equity in fraud of the rights of the orator."

The prayer of the bill is that Elizabeth Hookey, now Morris, answer and account, and that the Court

"set aside the said alleged warranty deed and declare the same a mortgage to secure the advance of said defendant (Elizabeth Hookey) to said Mary Whouley, and that the said Elizabeth Hookey be required to either foreclose the same or that the said property may be sold under order of this Court, and that the said defendant after having accounted for the rents received and produced proof of the advances made by her on behalf of said Mary Whouley, be required to pay over the balance of the proceeds of said sale arising out of the sale of said property to the heirs at law of Mary Whouley";

and should mean to or for said property and with the purpose (to
quote from the bill) that the "described real estate and the
interests therein after the payment of all the amounts by
assessed to said Mary Hensley as a right to divided among the
heirs at law of said Mary Hensley", of whom the respondents,
Walter Hensley, is one, and the defendants, Walter and Elizabeth
Hensley, are the others. The complainant alleged in her petition
that the property in question was with her and that the
defendant, Elizabeth Hensley, had collected from the year 1900
the proceeds since June 15, 1900, and was about the payment of
all the amounts, which it was alleged Elizabeth Hensley was
owed to 1900, and an account of the same received,
which will remain a lien on the equity, to-wit: Three
thousand Dollars, of which the estate is entitled to two thousand
Dollars.

Respondent insistently, further alleged of the
bill assert that although Elizabeth Hensley had acknowledged that
she holds the said real estate in trust for heirs at law of Mary
Hensley, she has on demand refused to account for rent received
from it for to pay the estate her share of the said property,
and in the contrary now declares that the said property is the
estate and legally hers and that she intends to withhold from
the estate any and all share in the said equity in favor of
the estate of the estate."

The prayer of the bill is that Elizabeth Hensley, now

plaintiff, answer and account, and the court

and the said alleged wrongfully deed and receive the
same a mortgage to secure the advance of said defendant
(Elizabeth Hensley) to said Mary Hensley, and that the said
Elizabeth Hensley be required to either foreclose the same
or that the said property may be sold under order of this
court, and that the said defendant after having accounted
for the trust received and received from the estate
made by her on behalf of said Mary Hensley, be required
to pay over the balance of the proceeds of said sale
the out of the sale of said property to the heirs at law
of Mary Hensley";

and for such further equitable relief as the Court may deem proper. The complainant inserted by amendment in the amended bill this clause:

"Complainant hereby offers to do equity and hereby tenders to the said defendant Elizabeth Hookey any and all amounts which may be due to her upon an accounting for the moneys advanced or loaned by her to said Mary Whouley, deceased."

As defendant's counsel suggest, the bill is rather one for foreclosure than one for redemption, which is the form in which a bill to declare an absolute conveyance a mortgage is generally and naturally cast.

But we have ignored technical questions of form in passing on the matter. A consideration of the evidence taken as a whole convinces us, as we have indicated, that it does not bear out the allegations of the bill. The evidence tending most strongly to support the complainant's case is the testimony concerning declarations of the defendant subsequent to the conveyance and the letters of her attorney after the matter was in controversy.

The letters of Mr. Young, the attorney, seem far from conclusive and are not sufficient to base the complainant's claim on. A family quarrel with its accompanying bitterness might well and commendably be brought to a close by the efforts of well disposed lawyers through the abandonment of legal rights which litigation might only establish.

As for the alleged declarations of the defendant, Lindauer vs. Cummings, 57 Ill., 195, states fairly the rule which should govern their consideration. The testimony concerning them should be treated with great caution. And as the Supreme Court of Illinois, speaking through Mr. Justice Hand, said in Rankin vs. Rankin, 261 Ill., 132, "Before a deed absolute in form

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator will then gather information about the problem and the people involved. This information will be used to determine the cause of the problem and to develop a plan of action.

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[illegible]

As a result of the above, the following is suggested:

But we have ignored judicial questions of law in writing on the matter. A consideration of the various taken as a whole convinces us, as we have indicated, that it is not out of the question that the matter is being treated and the discussion of the Bill. The various leading cases strongly to support the constitutional view in the foregoing statements of the Federal Government in the case of the various and the letters of our attorney after the matter was in

The letters of Mr. Young, the attorney, were the first
conclusive and are not sufficient to bear the complainant's claim
on. A family quarrel with the accompanying bitterness which
will not necessarily be brought to a close by the return of
well disposed lawyers towards the abandonment of legal rights.

As for the alleged destruction of the defendant, "Linn
County vs. O'Connell, 97 Ill., 194, states fairly the rule which
should govern their consideration. The testimony concerning
them should be treated with great caution, and as the Supreme
Court of Illinois, speaking through Mr. Justice Lind, said in
"Linn County vs. O'Connell, 97 Ill., 194, 'Before a verdict is taken

can be declared to be a mortgage, the proof showing the fact must be clear, satisfactory and convincing." We do not think it so in this case, and the decree of the Circuit Court is modified by striking out the words:

"It is therefore ordered and decreed that the said Elizabeth F. Morris is now the owner in fee simple absolute of said premises above described in said warranty deed by virtue of the said conveyance",

and as so modified is affirmed.

DECREE MODIFIED AND AFFIRMED.

has he declined to be a surgeon, the report stating the fact
must be clear, satisfactory and convincing. It is not clear
if he is this man, and the doctor of the "Small Town" is

modified to reading was the word:

"It is therefore ordered and directed that the said
Witness W. G. Davis is now the agent in the said matter
and said witness above described is said witness need by
virtue of the said commission."

and as so modified in evidence.

GRAND JURY AND JURY.

N. S. SHERMAN, doing
business as N. S. SHERMAN
MACHINE AND IRON WORKS,
Appellee,

vs.

KENNICOTT WATER SOFTENER CO.,
Appellant.

APPEAL FROM THE CITY COURT
OF CHICAGO HEIGHTS.

1821.A. 291

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the City Court of Chicago Heights. The judgment which was entered May 24, 1911, was for \$480. It is in favor of N. S. Sherman, the plaintiff below and appellee in this Court, and against the Kennicott Water Softener Co., a corporation, which was defendant below and is appellant here.

N. S. Sherman, the appellant, was a resident of and doing business in Oklahoma. The business was done under the name of the N. S. Sherman Machine and Iron Works. In August, 1909, he furnished and erected a steel smoke stack in Yukon, Oklahoma, as a part of an outfit of a mill plant which the Kennicott Water Softener Co., a corporation manufacturing and erecting steam boilers and like machinery, was there installing.

The suit in which the judgment here in question was obtained was brought in February, 1910, for compensation for the stack and accessories and its erection.

The amount of the judgment was, it is contended by Sherman, the agreed contract price of \$500.00 increased by a charge (which does not seem to be disputed) of four dollars for some extra material and diminished by an allowance of \$20 which is made for various small matters.

The defendant, the Kennicott Company, admits that it

1891 A. 291



MR. JUSTICE HOWE DELIVERED THE DECISION OF THE COURT.

This is an appeal from a judgment of the City Court of Chicago. The judgment which was entered was in favor of the defendant, and against the plaintiff. The plaintiff is a corporation, and the defendant is an individual. The plaintiff is a corporation, and the defendant is an individual. The plaintiff is a corporation, and the defendant is an individual.

At the time of the trial, the plaintiff was a resident of the City of Chicago. The defendant was a resident of the City of Chicago. The plaintiff was a resident of the City of Chicago. The defendant was a resident of the City of Chicago. The plaintiff was a resident of the City of Chicago. The defendant was a resident of the City of Chicago.

The suit in which the judgment was entered was in question and answer. The plaintiff was a resident of the City of Chicago. The defendant was a resident of the City of Chicago. The plaintiff was a resident of the City of Chicago. The defendant was a resident of the City of Chicago. The plaintiff was a resident of the City of Chicago. The defendant was a resident of the City of Chicago.

owes Sherman \$336, but maintains that this is the extent of its liability. It contends that the contract price was four, not five, hundred dollars, and claims deductions from that contract price, the nature of which do not appear.

The facts seem very clear from the correspondence. A proposition was made in writing to the Kennicott Company on June 24, 1909, by "The H. S. Sherman Machine & Iron Works" to deliver and erect the stack for \$400, and it was immediately accepted by the Kennicott Company through its representative and agent, who seems to have transacted all the business relating to this matter, one G. Y. Bonus. It is contended by Sherman that this offer was made conditionally by a representative in his absence, and required his ratification to make it binding on him. There is no competent evidence of this. The statement, so far as this record goes, is based on his subsequent self-serving recitals in the correspondence introduced. It is moreover apparently dependent on the position that a prior unaccepted offer of Sherman's was for the manufacture of the stack only, and did not include its delivery and erection,-a position which is inconsistent with the letter introduced in evidence making said prior offer. This condition of things explains the dispute between the parties which led to this litigation, but it is therein immaterial, because before any work was done under the offer thus made and accepted, the offer was repudiated by Sherman and the repudiation was acquiesced in by the Kennicott Co. through its agent, Bonus. A new contract was made, under which the work was done.

The controversy in this cause turns entirely on letters and telegrams of the H. S. Sherman Machine & Iron Works to Bonus of July 1 and July 3, 1909, in which it says positively that it will not manufacture, deliver and erect the stack for less than \$500.00, and on Bonus' answer thereto by wire, as follows:

"Chicago, Ill., July 8, 1909.

N. S. Sherman Iron Works,
Oklahoma City, Oklahoma.

Yours received. You finish the stack quickly as possible. I be at Youkon Monday.

G. V. Bonus."

The defendant, the Kennicott Company, places its defence on the position that Bonus was without authority to give this order to Sherman to proceed.

Bonus, the Kennicott Company maintains, had no power to make any contract in its behalf, and Sherman no justification in dealing with him as having it.

But this contention cannot be sustained. All of the correspondence introduced (and this correspondence is practically all the evidence) negatives it. Bonus managed for the Kennicott Company all the business relating to the work and the offers of the Sherman Iron Works were all made to him (under different styles), the one of June 24, 1909, naming \$400, included. This was addressed, indeed, in writing to the Kennicott Co., but it was evidently handed to Bonus, who wrote an acceptance of it on the spot. There is no hint in any of the letters of the Kennicott Company, after the claim of Sherman was made for \$484, that Bonus did not have power to act for it. The implications are all to the contrary. The matter had to be referred to him for report and settlement. The contract of 1907 stating, as between themselves, the relations of Bonus and the Kennicott Company, is not evidence that Bonus had not the authority which he assumed. He himself does not take any such position. Writing to his principal, the Kennicott Company, he merely says: "If I wired them to go at the work, my intentions were not but to pay the contract price."

It makes no difference what his intentions were. He received an ultimatum from the Sherman Iron Works and, probably

thinking that the immediate circumstances compelled it, acquiesced in it for the Kennicott Company. The work was done under the contract thus made.

The judgment of the City Court of Chicago Heights is affirmed.

AFFIRMED.

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HARRY B. O'DELL,
Appellee,

VS.

AMERICAN BOX ROLL COMPANY,
a corporation,
Appellant.

APPEAL FROM THE COUNTY COURT
OF COOK COUNTY.

182 I.A. 292

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

Harry B. O'Dell, the appellee, having as plaintiff in the court below obtained a judgment for \$300.00 against the American Box Ball Company, the defendant below, that Company has appealed to this court.

The judgment was rendered on the verdict of a jury, to which evidence showing the following state of things had been submitted. The defendant corporation was in 1910 a manufacturer and vendor of box ball alleys, a variation of the bowling alley, smaller and less expensive, and with pins which are worked by a lever from the other end of the alley. It had a selling agent named Arndt, who negotiated a sale of several of these alleys to the plaintiff, who was or then became an operator or proprietor of a bowling resort. The plaintiff, finding the alleys satisfactory and popular with the public, told Arndt that he would do his best to get customers for him. The nature of the arrangement, if there was any arrangement, concerning compensation for exertions of this kind by O'Dell, is in dispute. O'Dell contends that it amounted to a contract, made by Arndt as the general and authorized agent of the defendant in that behalf, to pay him, O'Dell, twenty dollars per alley for each purchaser referred by him to Arndt. He further contended in the court below that there were thirty alleys sold by Arndt through such introductions of customers, and that he was therefore entitled to

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at New York, this 18th day of June, 1932.

1821A.302

HARRY N. O'DELL,
Plaintiff,
vs.
AMERICAN BOX PALE COMPANY,
Defendant.

THE JUDGMENT BEING DELIVERED THE VERDICT OF THE COURT.

HARRY N. O'DELL, the plaintiff, having no objection to the facts set forth in the complaint, the defendant, American Box Pale Company, the defendant, being duly sworn, has appeared to this court.

The judgment was rendered on the verdict of a jury, which evidence showed the following facts: That the plaintiff, the defendant corporation was in 1912 a manufacturer and vendor of box pale alloys, a variation of the boxing alloy, which was less expensive, and also sold and shipped by a carrier from the other end of the alloy. It had a million more cases than, who represented a sale of several of these alloys to the plaintiff, who was or then became an operator in production of a boxing alloy. The plaintiff, finding the alloy satisfactory and popular with the public, sold them that he was to be paid to get customers for him. The nature of the arrangement, it seems was any arrangement, concerning commission for execution of this kind by O'Dell, is in dispute. O'Dell contends that he is entitled to a contract, made by him as an agent and authorized agent of the defendant in that behalf, to pay him, O'Dell, twenty dollars per alloy for each purchase returned by him to Agent. He further contends in the court below that there were thirty alloys sold by Agent between such introduction of customers, and that he was therefore entitled to

\$600.00 from the defendant company. The jury gave him \$300.00. On what basis they made the computation is somewhat difficult to see.

But the primary and controlling question in the case is not the amount due to the plaintiff, but whether the defendant company is liable for it. That some negotiation concerning the introduction of customers took place between Arndt and the plaintiff, and that some promise, express or implied, was made by Arndt before the introductions took place, seems reasonably certain, although the testimony of Arndt by itself might leave even this in doubt. He apparently refers such promise as he admits making to a time subsequent to the sales. O'Dell, however, says that on August 26, 1910, when he, O'Dell, made to Arndt a payment on account of the first alleys purchased by him, under circumstances to be hereinafter mentioned, Arndt told him that for any customers O'Dell referred to him (Arndt), he (O'Dell) should receive twenty dollars per alley sold. Mrs. O'Dell, the wife of the plaintiff, who testified without objection by the defendant, also swore that Arndt said at this conversation that for any customers that O'Dell would refer to Arndt there would be \$20.00 per alley in it for him. Arndt's version of this conversation, although he puts it at a different date, seems to be: "He (O'Dell) says to me, 'Is there any commission?' I says, 'Well, I guess the Company is paying ten per cent. commission or about \$20.00'."

On cross-examination Arndt testified that in September, 1910, in Chicago, he told O'Dell that when the last payment on the mortgage on the alleys O'Dell had bought fell due, there would be an allowance made to him for his services in getting customers for the Company. And that in November, 1910, at Indianapolis he (Arndt) told O'Dell that he (Arndt) would allow

...the defendant company. The jury gave him \$100,000.
On that basis they made the computation in the exhibit
in fact.

That the primary and controlling question in the case
is not the amount due to the plaintiff, but whether the defendant
and company is liable for it. That some negligence concerning
the introduction of evidence took place between them and the
plaintiff, and that some promises, express or implied, were made
by them before the introduction took place, seems reasonably
certain, although the testimony of them by itself would have
been more in doubt. He accordingly reports such promises as he
has gathered to a time subsequent to the trial. O'Dell, however,
says that on August 26, 1916, when he, O'Dell, made to them a
statement in support of the trial which was made by him, which
statements to be kept in mind, O'Dell said that the trial
was conducted O'Dell referred to him (O'Dell), he (O'Dell) should
receive twenty dollars per day while he, O'Dell, was with
them. O'Dell, who testified without objection by the defendant
and, also swore that O'Dell said at this conversation that for any
statement that O'Dell would make to them there would be \$20.00
per day in it for him. O'Dell's version of this conversation,
although he puts it at a different date, seems to be:
"I said to me, 'Is there any commission?' I said, 'Well,
I think the company is paying ten per cent. commission on about
\$50,000.'"
On cross-examination O'Dell testified that in September,
1916, in Chicago, he said O'Dell that when the first payment on
the mortgage on the O'Dell had been paid to him, there
would be an allowance made to him for his services in getting
conducted for the company. And that in November, 1916, at
Indianapolis he (O'Dell) said that he (O'Dell) would also

him (O'Dell) a certain amount out of his (Arndt's) own commission for the little work he had done for him; but that O'Dell did not accept this offer and nothing had been paid him.

This testimony, which is all there is concerning the nature of the promise made, is by itself manifestly insufficient to prove any liability against the defendant Company. The authority of an agent cannot be established by the words or declarations of the agent. Moreover the statements sworn to are all consistent with their being, as defendant maintains they were, undertakings of Arndt for himself and not for the Company.

Evidence of actual authority to Arndt to make any stipulation for the Company for commissions to be paid to a third person making sales, is lacking. On the contrary, both the assistant manager of the defendant company and Arndt testified that Arndt's employment was confined to soliciting orders and submitting them to the company, and receiving advance payments on them, and that his own compensation was purely on a commission basis of a certain amount for each alley sold.

But the plaintiff, to establish the proposition that Arndt, whatever his actual authority or the want of it between himself and the Company, was so held out by the defendant as a general agent of the company or as a special agent with the power to bind it in this alleged contract, that it is not at liberty to repudiate it, relies on four contentions: (a) That as the evidence shows that Arndt was taking orders in Chicago for the Company and filling them, it might be properly assumed by the plaintiff that he was a general selling agent, with power to appoint sub-agents for the company, or assistants for himself, at the expense of the company. (b) That the evidence shows that by letter to Mr. O'Dell, signed by the Treasurer, and by tele-

and (b) a certain amount out of his (Arundel's) own account -
that the latter was he had been told him; but that O'Dell did
not receive this offer and nothing had been paid him.
This testimony, which is all there is concerning the
nature of the previous made, is by itself wholly insufficient
to show any liability against the defendant company. The
evidence as to what cannot be established by the words on Arundel's
evidence as to the agent. Moreover, the evidence seems to me all
consistent with their being, as defendant maintains, bona fide
representatives of Arundel for himself and not for the company.
Evidence of actual authority is found in some way either
given for the Company for commissions to be paid to a third person
other than, is Arundel, or the company, or the defendant
company of the defendant company and Arundel testified that
Arundel's employment was confined to soliciting orders and nothing
else from the company, and positively witness to the fact that
and that his own compensation was purely on a commission basis
of a certain amount for each order sold.
But the plaintiff, to establish the proposition that
Arundel was his actual authority, or the want of it between
himself and the company, was he held out by the defendant as a
general agent of the company or as a special agent with the
power to bind it in this alleged contract, that it is not as
difficult to establish it, relies on four considerations: (a) That
as the evidence shows that Arundel was taking orders in "his
own name and filling them, it might be properly assumed
by the plaintiff that he was a general selling agent, and hence
to appoint sub-agents for the company, or associates for himself,
at the expense of the company. (b) That the evidence shows that
by letter to Mr. O'Dell, signed by the Treasurer, and by letter

phonic communication to Mrs. O'Dell in August, 1910, through the Assistant Manager, the Company asserted that Arndt was the Company's general agent and representative. (c) That it shows that in November, 1910, after the transactions for which compensation is claimed by the plaintiff, the Treasurer of the Company admitted to the plaintiff that Arndt was the "general representative" or "general agent" of the Company in Chicago. (d) That it shows that on September 23, 1910, the defendant company, by a letter to one Hughes about a commission promised him by Arndt, recognized the authority of Arndt to contract for commissions from the Company to his assistants or sub-agents.

We are unable to agree with any one of these contentions. The assumption mentioned in (a) can not properly be made. A selling agent on commission who takes orders and submits them to his principal has no implied authority to constitute other persons agents of the company, certainly none to secure assistants for himself in selling, and to add the commissions of such assistants to his own commissions and to the selling expense falling on the company. If he chooses to make arrangements for selling through others, it must be at his own expense. The letter and conversation which form the basis of (b) were clearly limited in their assertions to the authority of Arndt to receive the advance payment of \$180 on the alloys bought by him. To say, in answer to a letter inquiring concerning the payment of money, whether a given person is ^aduly authorized agent to receive it, that the person is "all right in every respect" and that the money may be turned over to him in instruments made payable to the principal, is certainly not to hold out that given person as possessing all the powers of the principal; nor, when the subject spoken of was merely the payment of the money, is substantially the same statement, even with the addition that the person was

specific communication to Mrs. O'Hall in August, 1910, through
the Assistant Manager, the Company received that funds were the
Company's General agent and representative. (c) That it was
that in November, 1910, after the transaction for which com-
pensation is claimed by the plaintiff, the issuance of the Company
warranted to the plaintiff that funds were the "General repre-
sentative" or "General agent" of the Company in Chicago. (d) That
it was that on September 22, 1911, the defendant company, by
a letter to one Hedges about a commission provided for by funds,
expressed the authority of funds to receive for commissions
from the Company to his assistance on this matter.
We are unable to agree with any one of these propo-
sitions. The assumption mentioned in (a) was not made by Hedges.
A similar agent or commission was made without any relation to
the plaintiff and no implied authority to commission other
persons agents of the company, certainly none to receive com-
mission for himself in selling, and to add the commission of such
others to his own commission and to the selling expenses
of the company. If he proposed to make any commission for
selling through others, it must be at his own expense. The propo-
sition mentioned which form the basis of (b) was a denial
of their commission as the authority of funds to receive
the advance payment of \$100 on the sales made by him. It was
made to a letter inquiring concerning the payment of money,
whether a given person is only authorized agent to receive it,
that the person is "all right in every respect" and that the
money was to be turned over to him in full payment made by him to
the principal, is certainly not to hold out that given person as
possessing all the power of the principal; not, when the subject
question of the receipt of the money is substantially
the same statement, even with the addition that the person was

the principal's representative and that anything he said or did would be satisfactory, any more conclusive on the point indicated. All such expressions must in reason be referred to the subject of the conversation.

A slightly more plausible ground for argument can perhaps be found in favor of the contention (c), that in November, 1910, Mr. Hoke, the treasurer of the company, admitted that in the preceding months Arndt had been the general representative of the company in Chicago. But the argument is not sound. For in the first place, O'Dell (who is the only witness to this conversation and is contradicted by Arndt, who was present at the interview) did not testify that Hoke told him that Arndt had been a general agent of the Company in August, September and October, but that he was (that is, at the time of the conversation) "a general agent" or "a general representative" in Chicago. But when the testimony is further analyzed a stronger reason appears for not holding it confirmatory of the plaintiff's contention. It rather seems to be adverse to it than otherwise. For, like the words used in the telephonic conversation in August, the language must be referred to the matter under discussion. O'Dell's testimony is:

"I told Mr. Hoke I wanted to know something about this commission, and he told me that Arndt was their general representative in Chicago and that I would have to do business with him."

Arndt's testimony concerning this conversation was:

"Mr. Hoke done all the talking; he stated positively that I had no authority or anybody else to pay commissions unless he verified it himself in writing"; and "I asked O'Dell what was the trouble; he says he wanted to know where he was going to get off with reference to the commissions on the alleys that he sold. I asked him how many and he said thirty. I said: 'That is news to me. I never seen any thirty that you sold.' Mr. Holcomb (the vice president of the company) said, 'Mr. Arndt has no authority to make any commission basis with anybody.' Mr. O'Dell said, 'I don't know anything about that'."

The principal representative and that must be said to all
could be satisfactory, any more conclusive on the subject
of the investigation.

A slightly more complete review of the subject and the
fact is that in view of the evidence [redacted] that in
fact, the character of the company, which is in
the present working state had been the general representative
of the company in Chicago. But the company is not sound. The
in the first place, O'Dell (who is the only witness in this com-
pensation and is contradicted by Arndt, who was present at the
interview) did not testify that he had said that word and
that a certain amount of the company is sound, but that he was
labor, but that he was (that is, at the time of the conversa-
tion) a certain amount of the company is sound, but that he was
not. And that the company is not sound and is not sound
which appears to be the only contradiction of the witness
O'Dell's contention. It rather seems to be a matter of fact
otherwise. For, like the words used in the telephone conversa-
tion in Chicago, the language must be referred to the matter

most important, O'Dell's testimony is
"I said that I would be more forthcoming about
this conversation, and he told me that Arndt was there and
that representative in Chicago and that I would have to be
business with him."

Arndt's testimony concerning this conversation was:
"Mr. O'Dell, I have all the talking; he asked me
that I had no authority or anybody else to pay commissions
unless he verified it himself in writing; and I said
O'Dell was the trouble; he says he would be more
than he was willing to get off with reference to the commis-
sion on the Chicago case. I asked him how much
and he said thirty. I said: 'That is more to me. I want
to hear you say that you said it. Mr. O'Dell (who was
present at the company) said, 'Mr. Arndt has no authority
to make any commission deals with anybody.' Mr. O'Dell
said, 'I am not willing about that.'"

Connected with the offer of Arndt,unaccepted,to pay "something" out of his own compensation, it seems quite probable that the language which O'Dell testifies to as used by Mr. Hoke, if it was actually used, was meant to apply to the question, which was quite evidently then mooted and has continued alive until the present time, of whether it was the company or was Arndt who was the debtor of O'Dell. At all events, properly construed it was certainly no admission that Arndt had authority to bind the Company to make the payments claimed, but rather a repudiation of that proposition.

As to (d), the letter to Hughes from the assistant manager of the company should never, in our opinion, have been admitted in evidence. It is incompetent, therefore, to prove anything. But giving it the full force of competent evidence, it does not prove anything material. Of course there may have been special authority to Arndt to deal with Hughes, or any other third person, in a way in which he had no authority to deal with O'Dell, and the Company, moreover, had a right to ratify an unauthorized transaction of Arndt in one case and not in another. We think, assuming as we must, that the jury found that all the contentions of the plaintiff as to what actually was said or done were justified where the evidence was contradictory, there yet remains in the case no evidence that O'Dell had authority to bind the defendant company to pay commissions to O'Dell on the alleys sold to customers introduced by him to Arndt, nor even that in fact he attempted to do so, nor that O'Dell had a right to presume that Arndt had such authority or even was attempting to exercise it. Therefore we must reverse this judgment. Whatever claim O'Dell has is against Arndt alone.

The judgment of the County Court is reversed.

REVERSED.

connected with the story of André, unconnected, I think, with anything out of his own communication. It seems quite probable that the language which O'Dell testified to as used by W. T. Miller, if it was actually used, was meant to imply to the jury that Miller was quite evidently then married and was therefore living with the present time, of which it was the subject of the story who was the father of André. At all events, my testimony is that it was certainly an admission that André had a mother and that the language as to the payment of money, but rather a representation of that presentation.

As to (1), the letter I showed from the mother, manager of the company which was, in my opinion, never been written in evidence. It is important, I think, to note that it is the only one of the letters which I have not given evidence in regard to. It was written, in my opinion, by André, and it is not to be taken as evidence in any case in which he had no authority to write. O'Dell, and the company, however, had a right to verify an unauthorized statement of André in the same way and was in a position to verify, as we saw, that the letter was not all the contents of the plaintiff as to what actually was said or done were justified where the evidence was contradictory. There was no evidence that O'Dell had authority to bind the defendant company in any communication as O'Dell on the other side to whatever statement he made to him, nor even that in fact he attempted to do so, nor that O'Dell had a right to presume that André had such authority or even was attempting to exercise it. Therefore we were not bound to believe that O'Dell was in a position to bind the company. The language of the letter is not in evidence.

RECORDED.

IDA KNUDSON as Guardian of
CHARLES BURNETT KNUDSON,
minor,

Appellant,

vs.

WACKER & BIRK BREWING AND
MALTING CO., a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

182 I.A. 296

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of nil capiat and for costs in the Superior Court of Cook County against the plaintiff. The cause was tried before a jury, which found a verdict for the defendant, on which the judgment aforesaid was rendered.

The cause was one in which the plaintiff, Ida Knudson, as guardian of the estate of Charles Burnett Knudson, sued the defendant corporation, the Wacker & Birk Brewing & Malting Company, for damages to the said minor for an accident happening to him through the alleged fault and negligence of the defendant.

At the time of the accident the minor was ten years old.

The accident is described in a bill of particulars furnished by the plaintiff in connection with the declaration first filed, as follows:

"The accident set forth in the various counts of the declaration occurred to the said Charles Burnett Knudson, therein named, on or about the 22nd day of July, 1905, in the City of Chicago and State of Illinois, while the said Charles Burnett Knudson was riding upon a certain train of street railway cars then and there operated along and upon certain tracks in and upon a certain street of the City of Chicago known as Milwaukee Avenue, said cars being propelled by means of a cable and commonly known as cable cars. The said train of cars upon which the said Charles Burnett Knudson was riding was going in a northwesterly direction,

1921.1.29

THE COURT OF APPEALS
OF THE DISTRICT OF COLUMBIA
IN RE
THE ESTATE OF
JAMES A. HARRIS
DECEASED
PLAINTIFF
VS.
THE DISTRICT OF COLUMBIA
DEFENDANT

MR. JUSTICE WATSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the District Court.

The case in the District Court of the District of Columbia was brought by the plaintiff, James A. Harris, deceased, against the defendant, The District of Columbia. The case was tried before a jury, which found in favor of the plaintiff, and the judgment was entered accordingly.

Reversed.

The case was one in which the plaintiff, the District of Columbia, was the defendant. The case was brought by the plaintiff, the District of Columbia, against the defendant, James A. Harris, deceased. The case was tried before a jury, which found in favor of the plaintiff, and the judgment was entered accordingly. The case was then brought to this court by writ of error.

475

The record in this case is as follows:

The plaintiff, the District of Columbia, brought this case against the defendant, James A. Harris, deceased.

The case was tried before a jury, which found in favor of the plaintiff.

The record in this case is as follows: The case was brought by the plaintiff, the District of Columbia, against the defendant, James A. Harris, deceased. The case was tried before a jury, which found in favor of the plaintiff, and the judgment was entered accordingly. The case was then brought to this court by writ of error. The record in this case is as follows: The case was brought by the plaintiff, the District of Columbia, against the defendant, James A. Harris, deceased. The case was tried before a jury, which found in favor of the plaintiff, and the judgment was entered accordingly. The case was then brought to this court by writ of error.

and at the time of the accident had reached a point northwest from and near to the intersection of Milwaukee avenue and a certain other street of the City of Chicago known as North Avenue.

The team and wagon mentioned in the declaration, and managed and controlled by the defendant, was standing on the northeast side of the street railway tracks at a point three hundred (300) feet more or less northwest from the said intersection of North Avenue and Milwaukee Avenue, and was headed southeast. The said team and wagon was standing so near to the street railway track that the said Charles Burnett Knudsen riding on said train of cars as aforesaid unavoidably came in contact with some part of the said wagon or harness and was knocked off from said car thereby and his left leg was run over by said cars, as set forth in the declaration."

Thereafter by leave of Court an additional count was filed to the declaration, which charged that the defendant negligently "allowed one of its teams of horses or mules attached to one of its wagons to remain in the street, standing unattended, without securely fastening said horses or mules to prevent them from drawing or backing said wagon from going or moving near to or upon the tracks", and that the said team did draw or back the wagon against the car on which Knudsen was riding, so that he was knocked off and injured.

In this count of the declaration the plaintiff pleads an ordinance of the City of Chicago enacting that:

"No person shall leave any horse or other animal attached to any carriage, wagon, cart, sleigh, sled, or other vehicle in any public way of this city, without securely fastening such horse or other animal, under a penalty for each offense of not less than two dollars nor more than ten dollars."

The defendant pleaded the general issue of not guilty to the declaration and the issues were submitted to a jury, which found a verdict for the defendant.

A special finding was requested of them in answer to the question:

"Did the defendant's team and wagon in question remain stationary while the train of cars on which the plaintiff was riding passed the said team and wagon at the time of the accident?"

Each juror answered this question by writing "yes" or "no" and signing his name. Eleven jurors answered the question "yes" and one "no". Counsel for appellee in their argument say, "Owing to an oversight this special finding was not required to be corrected." The condition of the record seems to show there was no "special finding". To make it a special finding of the jury it must have been, like the general verdict, unanimous. The question was submitted to the jury over the objection and exception of the plaintiff. The failure to answer it unanimously could not be successfully urged as a reason for reversal of judgment. As a matter of fact it is not so urged, although the motion for a new trial noted among the reasons given, that "The special finding returned by the jury is void" Although the submission of the interrogatory is assigned for error, the alleged error is not insisted on. We do not think it, even if error, ground for reversal. Its submission could not, in our opinion, injure the plaintiff or bring about any miscarriage of justice. It may well be doubted, however, whether it was an ultimate and controlling question in the case.

The alleged errors which are insisted on are the admission of improper evidence in behalf of the defendant, the conduct of defendant's counsel in submitting to the plaintiff's witnesses improper questions, although objections to the same were sustained, and error in the giving and refusal of instructions.

We do not think the plaintiff has established on any of these matters a case justifying a reversal of this judgment.

So far as the given instructions are concerned we are forced to the conclusion that if there were technical error in them in any particular (which we do not decide), it would not be available to the plaintiff in the absence of any exceptions to the giving of them preserved in the record. Plaintiff, in

[illegible]

connection with a contention to be hereinafter noticed, concerning an amendment of the Practice Act which went into force on July 1, 1911, speaks of the "saving of exceptions" as a "relic of barbarism." This is rather an extreme view. Even if it be conceded that the difference between "an exception" and "an objection" is not so great as to make insistence on accurate phrasing expedient to preserve the benefit of the latter in an appeal or writ of error, it is certainly desirable, unless the action of a reviewing court is to be in every case in essence a trial de novo as a matter of right, not only that the trial Judge shall have pointed out both during the progress of the trial and on a motion for a new trial, the particular matters in which he is held to have gone wrong, so that he may, if he choose, correct them; but also that the reviewing court shall be confined in its examination to the points which were thus raised in the court below. Otherwise its work will be much and injudiciously increased. We see no controlling reason why the giving of instructions (although it is held that the objection or exception may be noted at any time before judgment) should be exempt from this rule. At all events, it has been uniformly heretofore held by the Supreme Court that it is not.

Bruen vs. The People, 206 Ill., 417, p. 425.

In the Bruen case, as in others, the Court having said that an assignment of error calling in question the instructions could not be considered for want of exceptions, has, apparently for the greater satisfaction of the parties, expressed itself as in accord with the said instructions. This is very different from reversing in such a case because not in accord with the instructions.

But the plaintiff contends that by the Act to amend Section 81 of the Practice Act of 1907, which went into force on

262. A 8618,

association with a corporation is the responsibility of the corporation, and not of the individual. The corporation is a legal entity, and it is the corporation that is responsible for the actions of its officers and directors. The individual officers and directors are responsible for their own actions, but they are not responsible for the actions of the corporation as a whole. The corporation is a separate legal entity, and it is the corporation that is responsible for the actions of its officers and directors. The individual officers and directors are responsible for their own actions, but they are not responsible for the actions of the corporation as a whole.

July 1, 1911, which was the day the judgment in the case at bar was entered, the necessity of any exception to the instructions complained of was abrogated.

The opening paragraph of the Section in question before amendment read:

"If during the progress of any trial in any civil or criminal cause either party shall allege an exception to the opinion of the court and reduce the same to writing, it shall be the duty of the judge to allow said exception and sign the same and the said exception shall thereupon become a part of the record in such cause.

The same provision is retained as an alternative in the amended section, but is preceded by this enactment:

"If, during the progress of any trial in any civil or criminal cause, either party shall submit to the court any matter for a ruling thereon, and the court shall rule adversely to the party submitting the same, such ruling shall be deemed a matter of review in any court to which the same cause may be thereafter taken upon appeal or by writ of error without formal exception thereto and after judgment at any time during the term of the court at which judgment was entered or within such time thereafter as shall during such term be fixed by the court any party desiring to prosecute a writ of error or appeal from any such judgment may submit to the court a stenographic report of the trial containing the evidence and the rulings of the court upon all or any of the questions submitted to and ruled upon by the judge thereof, and he shall examine the same, and if correct officially certify to the correctness of such report and the same shall thereupon be filed in said court and become a part of the record in said cause, and all matters and things contained in such stenographic report shall become as effectually a part of the record as if duly certified in a formal bill or bills of exceptions, OR if during the progress" - (the follows the provision given above with which Section 81 before the amendment began.)

We think that nothing more is necessary to show the fallacy of plaintiff's contention as to the effect of this statute than to call attention to the words in the amendment which we have italicized. Besides the peremptory instructions, however, one other instruction tendered by the plaintiff was refused, and the complaint that it was error to refuse it may stand on a different basis than that made of the giving of instructions requested by the defendant. Without passing on the

question whether the Act going into force on the day the judgment was rendered applied to this case and the refusal of the instruction on June 6, we shall therefore consider said instruction, although no exception was reserved to its refusal. It is as follows:

"The Court instructs the jury that if you believe from the evidence that the said Charles Burnett Knudsen received the injuries complained of while he was in the exercise of ordinary care for his own safety, then the question as to whether or not he had paid his fare or intended to pay his fare upon the street car on which he was riding at the time of the accident, if you believe he was riding upon such street car at the time, is immaterial."

In considering this proffered instruction a reference to the evidence becomes necessary. That evidence tends to show that Knudsen, a boy between ten and eleven years of age, was "flipping" a car, as that term is generally understood, when the accident happened. Without intending to pay their fare, and with the purpose of riding a very short distance, he and a companion a little older, had jumped upon the running board of a car in motion and were undoubtedly expecting to leave it while in motion. They were, as we think the evidence concerning their actions tended to show, doing this in a spirit of fun and mischief. Why otherwise did the boy make "a long nose" at the conductor? So dangerous had this custom among boys become that the City Council of Chicago had prior to this time passed the following ordinance, which was introduced in evidence by the defendant over the objection of the plaintiff:

"No minor under the age of eighteen years shall climb, jump upon, or cling to or in any way attach himself or herself to any horse, cable, electric or other street car, or any railroad locomotive or car of any kind while the same is in motion, under a penalty of not less than two dollars nor more than ten dollars for each offense."

The purpose of this ordinance was to discourage, and, as far as possible, to prevent a practice which was prevalent among children, not among persons of years and discretion, and

Question whether the fact being in issue on the day the judgment was rendered is this case and the verdict of the jury. The evidence on this point is that the defendant was present at the trial, although no objection was recorded in the record. It is

as follows:

The Court instructed the jury that if they believe from the evidence that the defendant was present at the trial, they should find him guilty of the crime charged. The jury returned a verdict of guilty. The defendant appeals from this verdict. The question is whether the evidence is sufficient to support the verdict. The evidence is that the defendant was present at the trial, although no objection was recorded in the record. It is

in considering this question a reference to the evidence is necessary. That evidence tends to show that the defendant was present at the trial, although no objection was recorded in the record. The evidence is that the defendant was present at the trial, although no objection was recorded in the record. It is in considering this question a reference to the evidence is necessary. That evidence tends to show that the defendant was present at the trial, although no objection was recorded in the record. The evidence is that the defendant was present at the trial, although no objection was recorded in the record. It is

The defendant over the objection of the plaintiff. The evidence is that the defendant was present at the trial, although no objection was recorded in the record. The evidence is that the defendant was present at the trial, although no objection was recorded in the record. It is

The purpose of this evidence was to show that the defendant was present at the trial, although no objection was recorded in the record. The evidence is that the defendant was present at the trial, although no objection was recorded in the record. It is

we do not think that a boy of ordinary intelligence over ten years of age, going to school and living in Chicago, could be considered unaffected by it, or that his violation of it could be properly ignored with reference to the question whether he was in the exercise of due care for his own safety. Therefore, we think the ordinance was properly admitted and that the instruction suggested would have been misleading even if not erroneous. It might easily have been understood by the jury to mean that in the opinion of the Court "flipping the car" was neither in itself nor as a violation of the ordinance evidence of negligence, unless connected with some conduct more than usually reckless, even from the point of view of the youth who "flip". This view, it is needless to say, would not be the correct one. We do not think the trial Judge erred in refusing to give the tendered instruction.

The rulings on evidence complained of by appellant are the admission over plaintiff's objection of certain matters. It is said that the defendant was erroneously permitted to prove by the court reporter the questions and answers made by some of the plaintiff's witnesses at a previous trial, or rather mistrial, of the case. The answers were admitted on the theory, still insisted on by the appellee, that they were inconsistent with the testimony of the witnesses at the present trial, and that those witnesses did not admit unequivocally that they had made them. The appellant disputes this position. We do not see how the error can have been harmful in this case, if it was error. If the testimony at the former trial was variant and its existence is not admitted by the witnesses, it was proper that it should be shown at the present trial. If the testimony was identical, or its giving was admitted, the error in allowing it to be read could not have influenced or prejudiced the

jury that we can see, unless in favor of and not against the witnesses' trustworthiness. It was not therefore in any event fatal or reversible error.

The admission of testimony of Weston as to measurements taken in the street does not seem to us erroneous, and we have already expressed our opinion on the admissibility of the "flipping" ordinance.

Nor do we think that there was error in the admission of the proceedings in the Probate Court leading up to the covenant not to sue various traction companies, made by the plaintiff and her husband (the father of her ward), on the payment of \$4000 by the Receiver of the Chicago Union Traction Company, for causing the injury to her ward. As throwing light upon the actual agreement of the parties and its effect upon the claim for further compensation from the defendant for causing the same injuries, we think it was competent. The following rule, quoted by appellee from Greenleaf on Evidence, 16th ed., Vol. 1, Sec. 297, is amply sustained by authority. The rule under consideration (that is, the rule that the written evidence of a contract may not be varied or contradicted by parol)

"is applied only between the parties to the instrument, as they alone are to blame if the writing contains what was not intended or omits that which it should have contained. It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings contrary to the truth, through the ignorance, carelessness or fraud of the parties, and who therefore ought not to be precluded from proving the truth, however contradictory to the written statements of others."

The records were introduced to throw light on the question whether it was the intention of the parties to make a full settlement and release of the Traction Company by the payment of the \$4000. That question, because of the effect of such a release of one tortfeasor on the rights of a codefendant, was material. It is insisted, however, that all the record

could be held to show was the statement of a guardian that could not bind the minor. If this is to be considered a valid argument, although the quit at bar is brought by the guardian, it may be noted that in no sense could the admission of these records, if it were an error, be considered reversibly prejudicial, in view of the only given instruction on the subject, which was merely:

"If the jury believe that the negligence of the street railway company, if any, in any way contributed to the accident, then they must apply the amount shown by the evidence to have been received by the plaintiff from it in reduction of the amount, if any, which the plaintiff would otherwise have been entitled to recover."

This was an accurate statement of the law, if the covenant not to sue the traction company were given only the force attributed to it by appellant.

We do not think the other objections to the rulings of the Court or to proceedings in the course of the trial merit detailed discussion. The real question after all, and the one which we believed the jury considered, was whether the defendant Company was guilty of negligence causing the accident to Knudson while he was in the exercise of that care required of him. Careful consideration of the evidence does not make us think that the decision of this question in favor of the defendant was unwarranted.

The judgment of the Superior Court is affirmed.

AFFIRMED.

...the fact is that the defendant is a married man
and not a minor. It is to be noted that a valid
marriage, although the fact of it is proved by the guardian,
it was noted that in no case could the admission of these
records, it is not an error, be a matter of reversible error.
Also, in view of the fact given instruction on the subject,

After the trial:

"It is the duty of the jury to believe that the negligence of the driver
was the cause of the accident, if any, in any way contributed to the ac-
cident, then they must award the amount shown by the evi-
dence to have been received by the plaintiff from it in
liquidation of the amount, if any, which the plaintiff would
otherwise have been entitled to recover."

This was an accurate statement of the law, it is

not to be said that the trial court was given only the

law as it is stated.

We do not think the other objections to the charge

of the court or to proceedings in the course of the trial were

materially prejudicial. The next session after this, and the one

which we believed the jury considered, was without the defendant

being and guilty of negligence causing the accident to the

and while he was in the custody of that party retained of him.

There is no error in the evidence taken and none in the

and the verdict of the jury in favor of the defendant was

reversed.

The judgment of the Superior Court is affirmed.

REVEREND,

PAUL MATT and CHARLES MATT,
minors, by CHARLES MATT,
their Guardian,
Defendants in Error,

vs.

JACOB MATT,
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT
OF CHICAGO.

182 I.A. 312

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action of the fourth class was brought in the Municipal Court of Chicago by Paul Matt and Charles Matt, minors, by their guardian, against Jacob Matt to recover \$500 claimed to be due them from the defendant. On a hearing before the Court, without a jury, the Court found for the plaintiffs and entered a judgment on the finding for \$500 against the defendant, to reverse which he sued out this writ of error.

It is admitted that the defendant received \$500 of the plaintiffs' money and has not paid same. He first invokes the Statute of Limitations. The plaintiffs are minors and under the Statute of Limitations, Chapter 83, Section 21, the plea is not good. It is next claimed by the defendant that he agreed with the guardian, Charles Matt, in November, 1903, that he would pay said sum when he collected certain mortgages, and said agreement was a condition precedent, and there being no proof that he had made said collections, the suit was premature. At the time in question the sum of \$500 was due and owing from the defendant to the plaintiffs and it was the duty of the defendant to pay same and of the guardian to collect same, and the said arrangement between the guardian and the defendant, brothers, was not binding on the wards, the plaintiffs here. But even if it were, the agreement was not a condition precedent. It only

gave the defendant a reasonable time to make the said collections and pay the amount due the plaintiffs. Rosenberg v. Lewis Mfg. Co., 171 Ill. App. 454. We regard the time from November, 1903, to June, 1912, very far from being a reasonable time.

The right of the plaintiffs to recover jointly is not assigned as error, and therefore we do not consider same.

The judgment is affirmed.

AFFIRMED.

When the defendant's evidence is taken into consideration
 there was not the weight for the plaintiff. January 7.
 Judge the "well" the bill was not. To require the time from the
 evidence, "that is done" the bill was not a reasonable
 time.

The kind of the plaintiff's evidence is not
 sufficient to show, and therefore he is not entitled to
 the judgment is affirmed.

REVEREND.

262-17797

MARGARET WARD,
Plaintiff in Error,

vs.

THE NORTH AMERICAN ACCIDENT INSUR-
ANCE COMPANY, a corporation,
Defendant in Error.

ERROR TO CIRCUIT
COURT, COOK COUNTY.

182 I.A. 317

MR. PRESIDING JUSTICE F. A. SMITH
DELIVERED THE OPINION OF THE COURT.

Margaret Ward, plaintiff in error, hereinafter termed plaintiff, brought an action of assumpsit against defendant in error, hereinafter termed defendant, upon a policy of accident insurance. The defendant interposed a general demurrer to the declaration, which demurrer the court sustained. The plaintiff, elected to stand by her declaration and the court adjudged costs against her.

The declaration consisted of one count, and avers that on March 19, 1908, the defendant issued to H. F. Ward, for value received and in consideration of the warranties and statements made in an application bearing an even number therewith, a policy of accident insurance which is set out in the declaration, and thereby agreed to pay to the beneficiary named in such application the sum of \$1000 in case of the death of the insured within thirty days from the date of such injuries as are mentioned in clauses 1 and 2 of the policy. Clause 1 provides that the policy covers injuries received while actually riding as a passenger in a place regularly provided for the transportation of passengers within a surface or elevated railroad car, steamboat, automobile, omnibus, cab, or other public conveyance provided by a common carrier for passenger service only; and clause 2 provides that the policy

EXHIBIT 101

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Margaret Ward, plaintiff in error, hereinafter termed
 plaintiff, brought an action of assumpsit against defendant in
 error, hereinafter termed defendant, upon a policy of accident
 insurance. The defendant introduced a general averment to the
 effect that which defendant the same contained. The plaintiff
 wished to stand by her declaration and the court ordered that
 against her.
 The declaration consisted of one count, and was that
 on March 12, 1900, the defendant issued to H. F. Ward, for value
 received and in consideration of the sum of one hundred and
 fifty dollars an accident insurance policy, the policy
 at various times and in various ways as set out in the declaration, and
 thereby agreed to pay to the beneficiary named in such application
 the sum of \$1500 in case of the death of the insured within thirty
 days from the date of such injury he was entitled to receive
 1 and 2 of the policy. Clause 1 provided that the policy covered
 injuries received while actually riding as a passenger in a motor
 vehicle or while riding on a railroad, automobile, omnibus,
 car, or other public conveyance provided by a common carrier for
 passengers only; and clause 2 provided that the policy

covers injuries received while riding as a passenger in any passenger elevator in a place regularly provided for the sole use of passengers. The policy set out in the declaration makes other provisions for death indemnity which are not pertinent to the consideration of the cause. It also provides specifically that the insurance created by the policy does not cover an employee of a common carrier while on duty, excepting employees only whose duties call them solely in the office and away from the tracks, train, yard, roundhouse and repair shop; and that the policy shall be valid and apply only to persons who are regular recorded subscribers in good standing to the two publications mentioned in the policy, and shall not, in any event, exceed the term of one year from the date written on the application attached.

The declaration further sets forth an application made to the Judge Company, Publishers, for eighteen months' subscription to "Judge", and in this application the name and occupation of the insured appears, but in such application there is no reference whatever to the defendant.

The declaration then avers that the insured came to his death in Chicago, Illinois, by falling from the platform of a passenger coach attached to a train, upon which platform he was necessarily riding in the performance of his duty as a switchman, and received the injuries which caused his death within thirty days from the date of the accident and solely and independently of all other causes; that the platform upon which the insured was riding was a part of a certain car which was a public conveyance provided by a common carrier for passenger service only within the meaning of the policy; that the policy was in full force and effect on the day the insured received the accidental bodily injuries described, and on the date of his death by reason of the payment of the subscription to "Judge" as in the application was provided; that on May 14, 1908, the said insured, H. F. Ward, made application for change of benefit

covers injuries received while riding as a passenger in any motor
car or vehicle in a place regularly provided for the sale and
transportation of passengers. The policy is not in the declaration unless after
provision for death indemnity which are not pertinent to the con-
sideration of the cause. It also provides specifically that the
insurances created by the policy does not cover an employee of a com-
pany or while on duty, excepting employees only whose duties
will take solely in the office and away from the tracks, train,
yard, roundhouse and repair shop; and that the policy shall be
valid and apply only to persons who are regular passengers and who
is good standing to the two publications mentioned in the policy,
and shall not, in any event, exceed the term of one year from the
date of issue of the application certificate.

The declaration further sets forth an application made
in the United States, Philadelphia, for a policy of insurance
to "Judge", and in this application the name and condition of the
insured appears, but in such application there is no reference what-
ever to the defendant.

The declaration then states that the insured was in his
death in Chicago, Illinois, by falling from the platform of a train
after coach attached to a train, upon which platform he was pas-
senger riding in the performance of his duty as a salesman, and
received the injuries which caused his death within thirty days of
the date of the accident and solely and independently of all other
causes; that the platform upon which the insured was riding was a
part of a certain car which was a public conveyance provided by a
common carrier for passenger service only within the meaning of the
policy; that the policy was in full force and effect on the day the
insured received the accidental bodily injuries described, and on
the date of his death by reason of the payment of the indemnity
to "Judge", as in the application was provided; that on May 14, 1914,
the said insured, E. F. Ward, made application for change of name

ciary in the policy to Margaret Ward, the plaintiff, and the application above mentioned, which was prepared by an agent of the defendant, is set forth; and that in pursuance of an arrangement between the defendant and the Judge Company the policy of insurance was obtained and kept in force because of the payment by H. F. Ward of the subscription money for the publication; and that the duties of Ward as a switchman required him to be upon and about the trains and platforms, of which fact the defendant company and its agent dealing with the said H. F. Ward in connection with the said policy of insurance had knowledge; and it further avers that when Ward became a policy holder in the company it was contemplated by both defendant and said Ward that he would be exposed to the dangers incident to his occupation.

By the averments of the declaration it appears that the policy set out in the declaration was not in force at the time of the alleged injuries. The policy bears date March 19, 1908, and expired one year from that date as provided therein. The averment that the policy was in force at the time of the accident and at the time of the death of H. F. Ward is a mere conclusion of the pleader. The facts set out in the declaration do not justify the conclusion. The terms of subscription to "Judge" was seventy-eight weeks, which would make the term expire in eighteen months from March 19, 1908, or sometime during the month of September, 1909. The death of the insured occurred on the 7th day of December, 1909,- nearly twenty-one months from the date of the policy. No fact is averred in any of the allegations of the declaration which would justify the court in drawing the inference that the policy was in force at the time of the injuries or of the death of the insured. The averment, that on May 14, 1909, Ward made application for and did change the beneficiary of the policy to Margaret Ward, the plaintiff, if proved, does not give grounds for the inference that the policy was in force. The application set out in the declaration has no policy number corresponding with the policy sued on and set forth in the declaration, and is not indorsed by the defendant or its agent.

It is urged in behalf of the plaintiff that while it was possible for the defendant to issue a policy containing proper limitations and restrictions and proper agreements between the parties to insure E. F. Ward against accident while actually riding as a passenger in a public conveyance provided by a common carrier for passenger service only, it did not do so. With this contention we cannot agree. The plain language and terms used in the policy, we think, contain limitations and restrictions with reference to the risks assumed by the defendant in the policy issued. The insurance was effective while the insured was riding as a passenger in a place provided for the transportation of passengers within a conveyance provided by a common carrier, but it did not cover the case set out in the declaration where the deceased was alleged to be discharging the duties of a switchman and was riding upon the platform of a conveyance in the discharge of such duties.

The declaration seeks to impose a liability upon defendant by the mere fact, as averred, that the agent who took the application knew Ward was an employe of a common carrier. This averment does not change the terms of the policy or raise a liability which is provided against by the very terms of the policy. The authorities cited by the plaintiff are not applicable to the facts averred in the declaration. The Circuit Court properly sustained a demurrer to the declaration. The judgment is affirmed.

AFFIRMED.

It is noted in detail at the Plaintiff's trial that

was provided for the defendant in issue a policy containing
terms, limitations and restrictions and proper arrangements between
the parties as issued H. V. Ford against accident while traveling
while as a passenger in a public conveyance provided by a common
carrier for passenger service only, it did not H. V. Ford
contain any such terms. The plain language and facts that it
the policy, as issued, contain limitations and restrictions with
reference to the risks covered by the defendant in the policy in-
clude. The language was effective while the insured was riding
as a passenger in a place provided for the transportation of
passengers within a conveyance provided by a common carrier, and
it did not cover the case set out in the declaration where the in-
sured was alleged to be driving the vehicle of a warehouse and
was killed upon the platform of a conveyance in the discharge of
his duties.

The declaration made it appear a liability upon the
part of the wife Ford, as asserted, that the agent who took the in-
surance knew Ford was an owner of a common carrier. This
statement does not change the terms of the policy or release a li-
ability which is provided against by the very terms of the policy.
The authorities cited by the Plaintiff are not applicable to the
facts covered in the declaration. The United States Circuit Court
issued a decree in the declaration. The judgment is affirmed.

WITNESSES

October Term, 1911, ...

377-17813

JOHN W. EAGLESTON, et al.,
Appellees,

vs.

ANNA BURRELL GOODYKOONTZ, Adm.,
Estate of CHARLES H. GOODY-
KOONTZ, deceased,

Appellant.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

182 I.A. 318

MR. PRESIDING JUSTICE F. A. SMITH
DELIVERED THE OPINION OF THE COURT.

Appellees, John W. Eagleston, Thomas F. Kelly and Peter S. Bonberg, filed their amended bill of complaint in the Superior Court of Cook County, praying that a certain written instrument be set aside and removed as a cloud upon their title to certain lots described in the bill.

The bill avers that on September 28, 1909, they were the owners and in possession of certain lots (describing them), and on January 20, 1906, one of appellees, Eagleston, executed a written agreement, a copy of which is attached to the bill of complaint, in words and figures as follows:

"This agreement made this 20th day of January, A. D. 1906, between John Eagleston, party of the first part, and Charles H. Goodykoontz, party of the second part, witnesses: That said first party in consideration of the services of the said second party in negotiation of an exchange of property, I constitute said second party my exclusive agent for the sale of (here follows description of property), for the sum of Eleven Thousand Dollars (\$11,000) net, to me, said second party to have all that he may obtain in excess of \$11,000 as compensation for services in said exchange.

"In case sale of said property is not effected by May first, 1906, and I do not elect to extend this option to October 1st, 1906, I hereby agree to pay said second party for the surrender and cancellation of this agreement the sum of Six Hundred twenty-five Dollars (\$625.00).

"Said first party agrees that he will convey this property in case of sale to whomever the second party may direct and failure or refusal on the part of said first party to carry out any or all of the provisions of this agreement makes him liable to said second party for the sum of \$1250.00.

(Signed) John W. Eagleston. (Seal.)

EXHIBIT

W. W. HARRINGTON, et al.,

PLAINTIFFS

VS.

THE BANK OF AMERICA

DEFENDANT

FILED

1881. A. 312

W. W. HARRINGTON, et al.,
PLAINTIFFS

VS.

THE BANK OF AMERICA

DEFENDANT

PLAINTIFFS

VS.

THE BANK OF AMERICA

DEFENDANT

PLAINTIFFS

VS.

THE BANK OF AMERICA

DEFENDANT

PLAINTIFFS

VS.

THE BANK OF AMERICA

DEFENDANT

PLAINTIFFS

VS.

THE BANK OF AMERICA

DEFENDANT

PLAINTIFFS

VS.

THE BANK OF AMERICA

"We, the undersigned, being equally and jointly interested in the above described property, do hereby consent to the extension of the within option as herein set forth, until October 1st, 1906.

Dated May 1, 1906.

(Signed) John W. Eagleston. (Seal.)
Thomas F. Kelly." (Seal.)

The bill avers that on October 1, 1906, appellant, Charles H. Goodykoontz, requested Eagleston to again extend the above agreement which Eagleston refused to do; that Goodykoontz pretends that said Eagleston has not carried out the provisions of said agreement and that the same is in full force and effect; but that the terms of the agreement have in all respects been complied with and the same has become null and void.

The bill further avers that on September 27, 1906, Eagleston and Kelly entered into a written agreement with one Peter S. Ronberg for the sale of a portion of said property, and that on September 28, 1906, Goodykoontz placed on record in the Recorder's office of Cook County, Illinois, the said contract between Eagleston and himself and the extension executed by Eagleston and Kelly, and that thereupon Ronberg refused to accept title on account of the record of the instrument.

It is then alleged that subsequently a conveyance of a portion of said property was made to Ronberg, but that Ronberg has retained \$1250 to secure himself against all claims that Goodykoontz may have, and that the complainants are willing to bring into court \$1250 and also any other amount that Goodykoontz may claim on account of said instrument.

The bill avers that at the time of the filing of the bill the complainants were in possession and in the actual use and occupancy of all the premises and that the record of the agreement is a cloud upon the complainants' title and tends to depreciate the value thereof and ought to be set aside and delivered up to be cancelled.

Charles H. Goodykoontz filed a general demurrer on

THE above mentioned, being specially and jointly authorized
as in the above mentioned capacity, to hereby consent to the
execution of the within title as herein set forth, under
October 2nd, 1902.

Witness my hand, this 2nd day of October, 1902.

(Signed) John T. Lippincott
(Signed) Thomas V. Kelly

The bill above read of October 2, 1902, notwithstanding
Charles H. Thompson, requested permission to again submit the
above proposed title. Permission was granted to him that he might
submit this title. Permission was not granted but the permission
of said attorney and that the same be in full force and effect.
and that the terms of the agreement have in all respects been
complied with and the same are deemed well and valid.

The bill further reads that on September 27, 1902,
Thompson and Kelly entered into a written agreement with one
John T. Lippincott for the sale of a portion of said property, and
that on September 27, 1902, Thompson and Kelly entered into the
written agreement of said property, Lippincott, the said property
between Thompson and Kelly and the attorney mentioned by
Thompson and Kelly, and that Thompson and Kelly entered into the
written agreement of said property.

It is also stated that subsequently a conveyance of a
portion of said property was made to Thompson, but that Thompson has
retained title in certain parcels and that all other parcels have
been sold, and that the said Thompson has agreed to return
said parcels to Kelly and also any other parcels that Thompson may
claim as belonging to said Thompson.

The bill states that of the day of the filing of the
bill the same was in possession and in the actual use
and possession of all the parties and that the record of the title
was in a state of confusion, and that the title is now in the
possession of Kelly and should be so retained and should be so

retained.
Charles H. Thompson filed a general disclaimer on

April 3, 1911, to the foregoing amended bill. On April 10, 1911, a decree was entered, overruling the demurrer of Goodykoontz, reciting the election of the defendant to stand upon his demurrer, decreeing that as to the defendant complainants' amended bill of complaint be taken as confessed; and, finding the facts alleged in the bill to be true, decreed that the written instrument be set aside, declared null and void as against the complainants as a cloud upon the title of the complainants, and ordered that Goodykoontz deliver up the instrument to be cancelled and pay the costs of the suit.

From the decree this appeal is prosecuted. It is contended on behalf of appellant, (1) that the instrument set out in the amended bill is not a cloud upon the title; (2) that a bill will not lie to remove as a cloud an instrument which does not purport to give some interest in the land; and (3) the decree of the court below is erroneous in that it purports to adjudicate matters that were not properly before the court.

A cloud upon title is defined to be a semblance of title, valid on its face, to show the invalidity of which it is necessary to resort to extrinsic evidence. It is an encumbrance apparently valid, but actually invalid. *Reed et al. v. Tyler et al.*, 56 Ill. 382. As declared in *Roby v. South Park Commissioners*, 215 Ill. 200, at page 203: "A cloud on title is an outstanding claim or encumbrance, which, if valid, would affect or impair the title of the owner and which appears on its face to have that effect, but which can be shown by extrinsic evidence to be invalid." In *Allett v. American Strawboard Co.*, 217 Ill. 53, the court said, "Such clouds upon title as may be removed by courts of equity are instruments or proceedings in writing which appear upon the records and thereby cast doubt upon the validity of the record title."

An examination of the instrument in question, in the light of these definitions of cloud on title, shows that it is

a mere contract to pay money, and gave to Goodykoontz, the appellant, no interest whatever in the land itself. The instrument only bound Eggleston to pay money under the facts set out in the contract. It contains no covenant to make a conveyance of the land such as would require a court of equity, at the instance of Goodykoontz, to compel a conveyance. It, therefore, does not create an interest or title to the land, but is a mere agreement to pay money under certain conditions. *MacDonald v. Dexter*, 234 Ill. 517; *Irwin v. Powell*, 188 Ill. 107. If appellant had produced a purchaser ready, willing and able to buy the property in question upon the stipulated terms, and the complainants had refused to convey, Goodykoontz's only claim would be for money, - either for \$1250 or the difference between \$11,000 and the price at which his purchaser was ready, willing and able to buy. The contract appears on its face to be a complete contract, and it will be conclusively presumed to contain all the obligations of the parties. *Telluride Power Co. v. Crane Co.*, 208 Ill. 212. The rights of Goodykoontz are measured by the terms of the contract which gives him, in the event of default of the other parties, not a right to enforce the contract in any manner against the land, but a claim for money damages only.

The mere fact averred in the bill that Goodykoontz pretended that the provisions of the contract had not been carried out and that it was in full force and effect does not of itself make the instrument a cloud. *Parker v. Shannon*, 121 Ill. 452.

The mere recording of the instrument does not of itself make it a cloud upon title. *Nickerson et al. v. Loud et al.*, 115 Mass. 94. In the last cited case the court said, "In order to induce a court of chancery to order a writing to be cancelled or surrendered, as constituting a cloud upon title, it must at least be an instrument which upon its face is, or with the aid of extrinsic facts may be, some evidence of a right adverse to plaintiff's." The instrument, therefore, is not such an instrument as

constitutes a cloud upon the title, and the mere recording thereof does not of itself make it a cloud upon the title. The mere fact that Ronberg thought the instrument in question was a cloud and refused to carry out a contract of purchase for that reason, does not make the contract a cloud and is wholly immaterial upon the question presented. The bill does not present a case for the interference of a court of equity, for a court will not set in motion its powers and machinery to do a useless thing, and will not set aside as a cloud that which is not a cloud.

The decree is erroneous and is reversed and the cause is remanded with directions to dismiss the bill.

REVERSED AND REMANDED
WITH DIRECTIONS.

413-17951

MARY ELIZABETH McCANN et al.,
on appeal of MARY ELIZABETH
McCANN,

Appellants

vs.

THE LADIES OF THE MACCABEES OF
THE WORLD,

Appellees.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

1821A.319

MR. PRESIDING JUSTICE F. A. SMITH
DELIVERED THE OPINION OF THE COURT.

The original bill of exceptions in this cause was filed in the Circuit Court of Cook County on July 5, 1911. On April 3, 1912, that court, on motion of the defendant, appellee, signed and filed an amended and supplemental bill of exceptions, and entered an order with appropriate findings that it be filed nunc pro tunc as of July 5, 1911. A transcript of the amended and supplemental bill of exceptions was filed by leave of court in this cause in this court April 23, 1912. On June 17, 1913, a motion was made by appellants and taken by the court to strike the supplemental transcript from the record. Upon due consideration of the evidence taken and the findings of the court on the motion to amend and correct the bill of exceptions, the motion to strike is denied.

This action was brought by the plaintiffs, appellants, as beneficiaries under a benefit certificate issued by the Ladies of the Maccabees of the World, a Michigan corporation, to one Delia McCann, for the sum of \$1,000. In the application of Delia McCann for membership, made September 8, 1902, she stated that she was born May 12, 1853, and that she was forty-nine years of age on her last preceding birthday.

The defense set up in the pleadings and on the trial was that Delia McCann was more than fifty years of age on her last

birthday prior to her joining the defendant order; that she was born several years prior to May 18, 1853; that the defendant order was a Michigan corporation, and that the laws of Michigan provided that the corporators of a fraternal benefit society shall file with the Commissioner of Insurance for the state of Michigan a declaration containing, among other things, the name of the society, the place of doing business, the limit as to the age of applicants for beneficiary membership which shall not exceed fifty-five years; that the defendant filed its articles of association April 8, 1897, and afterwards amended the same on July 17, 1901, and filed the amended articles January 3, 1903, with the Commissioner of Insurance for the state of Michigan; and that the amended articles of association, among other things, provided that the objects and purposes of the corporation shall be to promote the best interests and general welfare of the order of Maccabees, * * * and to provide life benefits and disability benefits to those of sound bodily health between eighteen and fifty years of age.

The defendant having pleaded that the alleged contract of insurance was ultra vires, filed, prior to the trial of the cause, a plea of tender, setting forth that by reason of the said Delia McCann having been more than fifty years of age when she became a member and was, therefore, past the age limit provided for in the organic laws of the defendant order, the defendant was without power or lawful authority to issue a life benefit certificate or insurance contract to Delia McCann, and the alleged contract of insurance, upon which the plaintiffs seek to recover, was and is void and of no effect. The defendant tendered with the plea the amount of \$163.25, which was the total amount received by the defendant as dues and assessments from Delia McCann during her lifetime, and also tendered the amount of \$14 for costs expended by the plaintiffs in the proceedings up to the time when the defendant brought the amount of tender into court. To this

plea of tender no replication or any other pleadings whatever were filed by the plaintiffs. The plea of general issue was withdrawn by the defendant prior to the trial.

The only issue of fact on the trial of the cause was whether Delia McCann, at the time she made her application for membership in the defendant order, was more or less than fifty years of age. This was the issue tendered by the pleadings and to which the evidence was directed. Upon this issue the burden of proof was upon the defendant. To sustain its defense, the defendant introduced depositions of an elder brother and an elder sister of the deceased, a certificate of baptism of the deceased, and the census record taken pursuant to the laws of Great Britain and Ireland on March 30, 1851, and other proof tending to show that Delia McCann was baptized May 30, 1846, and that on March 30, 1851, she was five years old.

Against the evidence so introduced by defendant, the plaintiffs offered no proof except the statement made by the deceased Delia McCann in her application, that she was born May 18, 1853, if that can be considered proof in the case upon that question of fact.

At the close of the evidence, the court, on motion, directed a verdict in favor of plaintiffs to the extent of the amount tendered by the defendant, - \$163.25 and \$14 costs.

It is contended on behalf of appellants that the question of age was one of fact for the jury and that the truth or falsity of the assured's statement as to her age and the question of the identity of the assured with the person named in the record of baptism, etc., was for the jury, and that, therefore, the court erred in directing a verdict upon the proof contained in the record.

Where the evidence presents a controversy of fact on the material questions involved, appellant's contention is undoubtedly sound, but in this case the proof presented by appellees

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on the questions of age and identity of the assured was uncontradicted by appellants. The mere statement in the application of the age of Delia McCann was not evidence of the fact stated. The application, the benefit certificate and the by-laws of the association, so far as legal, constituted the contract between Delia McCann and appellee. *Covenant Mutual Life Assn. v. Kentner*, 188 Ill. 431; *Royal Arcanum v. Coverdale*, 93 Ill. App. 373; *A. O. U. W. v. Jesse*, 50 Ill. App. 101. By the terms of the certificate, the statement of the deceased in her application that she was born May 18, 1853, was a strict warranty as distinguished from a mere representation. A substantial breach of this warranty will defeat the policy unless the defense was waived by the defendant.

Our examination and study of the evidence in the case leads us to the conclusion that the evidence given at the trial, with all inferences that the jury could justifiably draw from it, was so insufficient to support a verdict for plaintiffs that the court was not bound to submit the case to the jury. The evidence shows very clearly that Mrs. McCann was over fifty years of age when she made her application and was admitted to the defendant order. The evidence shows, indeed, that she was over fifty-five years of age, the limit fixed by the statutes of Michigan.

A contract of insurance by a society which is outside of the object of its creation as defined by the laws of its organization, and, therefore, beyond the powers conferred upon it by the state, is wholly void and of no legal effect. *Steele v. Fraternal Tribunes*, 215 Ill. 190. When the contract is beyond the power conferred upon it by existing laws, neither the corporation nor the other party to the contract can, by acting upon it or by assenting to it, be estopped to show that it was prohibited by those laws. *Converse v. Emerson & Company*, 242 Ill. 619. The defendant order was powerless to insure Mrs. McCann at her age at the time she presented her application, and the contract of insurance was, therefore, void ab initio.

There was no error in the instruction of the court.

The judgment is affirmed.

AFFIRMED.

There was no error in the transcription of the text.

The document is attached.

Yours truly,

447 - 17987

CHARLES FUERBOETER,
Appellee,

vs.

RITTENHOUSE & EMBREE COMPANY,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

182 I.A. 321

MR. PRESIDING JUSTICE F. A. SMITH
DELIVERED THE OPINION OF THE COURT.

The plaintiff below, appellee, recovered a judgment in the Superior Court of Cook County for damages resulting from an injury received by him January 2, 1909, against defendant, appellant. Appellee was driving a two-horse team east on Augusta street in Chicago, about 400 feet west of Elston avenue. A horse owned by defendant, with a harness upon him and a piece of chain dragging behind him, ran into the team which plaintiff was driving, and plaintiff was thrown off his wagon and a wheel of the wagon ran over his leg, causing the injuries sued for.

On the trial, plaintiff dismissed as to the first, second and third counts of the original declaration, but afterwards the second count was reinstated.

The second count averred that on January 2, 1909, the defendant conducted and operated a lumber yard on the east side of Elston avenue near the intersection of Augusta street; that the yard was enclosed by a high board fence, to which access was had by means of a gateway equipped with a wooden gate, and that the defendant was then possessed of and using a certain horse in the yard, and it was the duty of defendant to keep the horse securely fastened or guarded so that the horse might not escape from the yard upon said streets; but that the defendant negligently permitted the gateway to remain open and unguarded, and thereby



MR. JUSTICE J. A. SMITH
DELIVERED THE OPINION OF THE COURT.

The plaintiff below, appellee, recovered a judgment in the Superior Court of Cook County for damages resulting from an injury received by his January 2, 1908, against defendant, appellee. Appellee was driving a two-wheeled team east on Adams street in Chicago, about 400 feet west of Winston Avenue. A horse owned by defendant, with a harness upon him and a piece of chain dragging behind him, ran into the team which plaintiff was driving, and plaintiff was thrown off his wagon and a wheel of the wagon ran over his leg, causing the injuries now law.

On the trial, plaintiff claimed as to the first, second and third counts of the original declaration, but afterwards the second count was reinstated.

The second count averred that on January 2, 1908, the defendant contacted and entered a lumber yard on the west side of Taylor street near the intersection of Jackson street; that the yard was enclosed by a high board fence, in which opened the door by means of a gateway equipped with a wooden gate, and that the defendant was then possessed of and riding a certain horse in the yard, and it was the duty of defendant to keep the horse so closely fastened or guarded as that the horse might not escape from the yard upon said street; but that the defendant negligently permitted the gateway to remain open and unguarded, and thereby

the horse escaped from the control of the defendant, ran out of the yard, through the gateway, into the street, and into the team of horses which plaintiff was driving, causing him to be thrown to the ground and injured.

An additional count of the declaration, filed December 15, 1910, avers that the plaintiff, on January 2, 1909, was seated in a wagon attached to a team of horses, and driving along Augusta street, and a horse owned or in use by the defendant was unattended and running away on said street, and ran with great force against the team driven by plaintiff, causing the team to become frightened and unmanageable, and causing the plaintiff to be thrown off the wagon upon the ground, which resulted in the injuries complained of. The general issue and a special plea were filed to the original declaration and to the additional count.

There is substantially no controversy in the evidence offered on the trial. It shows that the defendant was engaged in the lumber business and had a yard located on the east side of Elston avenue, which runs nearly north and south, and that Augusta street runs east and west but does not extend east of Elston avenue. The lumber yard of the defendant is so situated that if Augusta street were extended east of Elston avenue, it would run through the yard. Access to the lumber yard from Elston avenue is through a gateway or driveway to a main thoroughfare which runs east through the lumber yard for about 400 feet. Immediately south of the lumber yard is a coal yard into which a switchtrack from the Northwestern Railway runs, and extends north into the lumber yard of the defendant on the east side thereof. In the lumber yard there are passage-ways designated by the witnesses as alleys, which run north and south, connected with the main thoroughfare or driveway, and along these alleys are piles of lumber.

On the day of the accident in question, defendant's

the gates escaped from the control of the defendant, and out of the yard, through the gateway, into the street, and into the lane of travel which plaintiff was driving, causing him to be struck by the defendant's car.

An additional count of the declaration, filed December 22, 1914, avers that the plaintiff, on January 2, 1914, was seated in a wagon attached to a team of horses, and driving along a public street, and a horse owned or in use by the defendant was frightened and running away on said street, and ran with great force against the team driven by plaintiff, causing the team to become frightened and unmanageable, and causing the plaintiff to be thrown off the wagon upon the ground, which resulted in the plaintiff's complaint of. The general issue was a denial that the plaintiff was injured by the defendant's horse.

There is substantially no controversy in the evidence offered at the trial. It shows that the defendant was engaged in the business of hauling and had a yard located on the east side of Union street, which runs north and south, and that the defendant's yard was not only east but also north of Union street. The eastern part of the defendant's yard is situated at the intersection of Union street and the defendant's yard, and extends east through the yard to the lumber yard from Union street. A gateway or driveway to a main thoroughfare which runs north and south the lumber yard for about 100 feet. Immediately west of the lumber yard is a coal yard into which a railroad from the Northwestern Railway runs, and extends north into the lumber yard of the defendant on the east side thereof. In the lumber yard there are passageways designated by the witnesses as alleys, which run north and south, connected with the main thoroughfare or driveway, and along these alleys are also of

On the day of the accident in question, defendant's

employees were engaged in piling lumber in or near alley No. 8, about thirty feet north of the east and west thoroughfare. The pile of lumber was, at that time, about twenty-five feet high. The mode of piling the lumber was by placing a pulley on top of the pile of lumber, another pulley at the bottom of the pile, or about two feet from the ground, and a pair of tongs was attached to a light chain and passed up from the tongs to the pulley on the top of the lumber pile and down and around the pulley at the foot of the pile, and then attached to the whiffle-tree to which the horse, which ran away, was harnessed. The tongs would be attached to a piece of lumber by men upon the ground and the horse would pull the lumber to the top of the pile where there were two men who took it off the tongs. The horse would be backed up, the tongs would descend to the ground, ready to be attached to another piece of lumber. At the time of the accident, the horse in question was being led by Sebastian Smith by a strap about three feet long, attached to the bridle bit on the horse. At that time Sebastian Smith was a young man eighteen years old and weighed 135 pounds. The place where the lumber was being piled was close to the switch-track on which were standing some cars, and while defendant's servants were thus engaged, a switch-engine backed some cars into the yard or against the cars standing upon the track in the yard of defendant, and caused a great noise, and at the same time the engine blew off steam, which frightened the horse and he commenced to run away. Smith held on to the horse as long as he could and was thrown to the ground; the horse broke away from him and, breaking the chain to which he was attached, ran up the main thoroughfare and out through the gate and across Elston avenue and up Augusta street, and against plaintiff's team.

The plaintiff was the only witness in his own behalf, except a medical expert who testified in the case. The plaintiff testified that on the date in question he was driving a team of

The plaintiff was the only witness in his own behalf, except a witness whose testimony was in the case. The plaintiff testified that on the date in question he was driving a truck of

horses attached to a wagon on which was part of a load of sand, and was about to drive under the Northwestern railway tracks on Auguste street going east, and while he was driving on the south side, or right-hand side, of the street, he saw a run-away horse coming toward him; that the horse ran into his team which caused them to jump aside and the plaintiff was thrown off the wagon and, after being dragged a distance, the team got away from him and his leg was crushed by the front wheel of the wagon; that the horse was unattended and running very fast, gaining more speed as he ran; that the horse had a harness on and was dragging a long chain. This is the substance of all the testimony on the question of liability introduced by the plaintiff. No evidence whatever was offered by the plaintiff of what occurred in the lumber yard when the horse became frightened and broke away from control.

The testimony on behalf of the defendant showed the facts above stated as to the work being done by the horse and the manner in which the horse was used, and that he was in charge of Sebastian Smith who was leading him, and the manner in which the horse broke away. The testimony shows that Smith tried to hold the horse and clung to him and was dragged by him some distance, when Smith was thrown ^{down} and the horse broke away from him; that the horse had been used in the lumber yard for a number of years and was a quiet gentle horse and had never run away before. The evidence of the defendant shows that there was no negligence on the part of defendant's employees, and it is uncontradicted. No one employed by the defendant was careless or negligent. There is no averment in the declaration that the horse was a run-away horse or ever manifested any disposition to run away; nor is there any averment that the defendant had any knowledge that the horse would run away. The evidence on the part of the plaintiff discloses no fact or circumstance which would put the defendant upon notice that the horse would become frightened and run away. We think

the defendant's evidence negatives beyond all question of fact any negligence in the management of the horse, and, taking the evidence altogether, no ground of liability is shown. Staudle v. Bentchler, 64 Ill. 161; Swafford v. Rosenbloom, 102 Ill. App. 578; Hammond v. Melton, 42 Ill. App. 186.

The case presented by the evidence is quite similar to that of Caspers v. Anglo-American Provision Co., 159 Ill. App. 573.

The verdict of the jury was not justified by the evidence. The plaintiff was not entitled to recover, and the court should have so instructed the jury. The judgment is reversed.

REVERSED.

1. The defendant's evidence was not sufficient to establish that the defendant was not the author of the letter. The evidence in the case is not sufficient to establish that the defendant was not the author of the letter. The evidence in the case is not sufficient to establish that the defendant was not the author of the letter.

The Court reviewed the evidence in the following manner:

The version of the book was the "revision of the first edition" and was not entitled "revision" and was not published in 1961. The book was published in 1961.

October Term, 1911, No.

488 - 18028

JOSEPH STUCKEY,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

182 I.A. 337

MR. PRESIDING JUSTICE F. A. SMITH
DELIVERED THE OPINION OF THE COURT.

On November 18, 1908, the defendant in this action, appellant, was operating a double track street railway upon Ashland avenue, a north and south public highway in the city of Chicago. Ashland avenue crosses a stream or branch of the Chicago river about four blocks south of Twenty-second street. At this point there is a bridge about the level of Ashland avenue, and defendant's tracks were laid upon the bridge, which provided a wagon roadway upon each side of the tracks. When in a normal condition there was no elevation or obstruction between the tracks on the bridge, but for a few days before and at the time of the accident here involved, the west side of the bridge was out of use, and a fence or barrier was placed along the bridge between the street-car tracks. This barrier was $3\frac{1}{2}$ to 4 feet high, and was from eight to ten inches from the side of a street-car as it passed over the east, or north-bound, track. As a result of this condition of the bridge, defendant's south-bound cars ran over to the east track on a "grass-hopper" switch placed immediately north of the bridge. A similar switch was placed at the south end of the bridge to enable the south-bound cars to return to the west track after crossing the bridge.

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The plaintiff, appellee, in going home from his work, boarded an Archer avenue car, paid his fare and received a transfer ticket entitling him to passage on the Ashland avenue line. At the junction of the lines at Twenty-second street, plaintiff left the Archer avenue car and boarded a south-bound Ashland avenue car which was greatly crowded with passengers. It was a closed car with a platform at each end. The east side of the platform was closed and passengers were received and discharged from the west side. Plaintiff succeeded in getting on the step of the front platform. There was another passenger on the step at the time and several passengers were on the step of the rear platform. Plaintiff rode on the step with one foot on the platform until the car reached the switch at the bridge. While riding in this position, the conductor accepted his transfer.

When the car reached the switch, it was found that a one-horse express wagon was stalled at the north end of the switch, the west wheels of the wagon having dropped off the track into a hole made by the removal of the pavement of the street. The car stood a short time, the motorman waiting to see if the driver could get the wagon clear of the track, but as he was apparently unable to do so, the motorman requested the passengers to get off and assist in moving the wagon out of the way. In response to the motorman's invitation, several passengers, including the plaintiff, got off the front step and platform and went forward and lifted the wheels of the wagon out of the hole, and the track was cleared.

As soon as the wagon was clear of the track the motorman started the car forward. Some of the passengers succeeded in getting on the car before it started, but others, including plaintiff, did not succeed in getting on until the car was in motion. Plaintiff was the last one to get on the car and did not succeed until it was within twenty or twenty-five feet of the bridge. There was another man then standing at the south end of the step and plaintiff climbed on the step north of him and held on with both hands, his right hand grasping the handhold on the forward end of

the platform and his left hand grasping the handhold on the body of the car.

It was dark or nearly so at the time, and plaintiff did not see the fence or know of its presence, so he testified, and was not warned by the motorman or by any one else of its presence. Plaintiff was struck by the north end of the fence and thrown to the ground and injured.

The declaration consisted of three original counts and an additional count. The court instructed the jury that no recovery could be had under the first count, and the case was submitted on the remaining counts. The second original count charged negligence in failing to warn plaintiff of the presence of the fence. The third original count charged negligence in permitting the car to be so overcrowded that it was necessary for plaintiff to ride on the step, and in consequence he was struck by the fence. The additional count charged negligence in starting the car before plaintiff had time to board it and get into a safe position, and that in consequence he was standing on the step and was struck by the fence.

Upon the question whether or not the verdict for the plaintiff is justified by the evidence, we are of the opinion, after an examination of the evidence and a study of the arguments of counsel, that the conclusion of the jury on the questions of negligence of the defendant and contributory negligence of the plaintiff ought not to be disturbed. The evidence tends to show that the defendant's duty, through its servants in charge of the car to do all that human care, vigilance and foresight could reasonably do in view of the character and mode of conveyance employed, and consistently with the practical operation of its road to safely carry the plaintiff as a passenger, was not done. The defendant was negligent in permitting the overcrowded condition of the car. *Smock v. Chicago City Ry. Co.*, 150 Ill. App. 539. It accepted plaintiff as a passenger while he was on the step of the car. Thereby he was invited to ride in that place and there was an implied assurance that it was a safe and suitable place to occupy, and that he would be carried safely. *Rorer on Railroads*, (1884) pp. 1103-4; *Clark v. E.A. R.*

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Journal des Savants 1811, 11, 111

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and the following are also all true. Hence, we will not have a problem.

41. *See* *United States v. Smith*, 199 F.3d 1033, 1037 (9th Cir. 2000).

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at no time a "Satanist" and moreover, was ill with tuberculosis.

1. The first condition is that the system must be in a state of equilibrium. This means that the system must be at rest and not moving relative to the observer.

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Co., 36 N. Y. 135; Walter v. C. D. & M. R. Co., 39 Ia. 33. The evidence that defendant ⁿ gave no warning of the proximity of the fence to its tracks is uncontroverted. That it did not place the fence there is immaterial, for it had notice that the fence was there. South Side Fl. R. R. Co. v. Heevig, 214 Ill. 463. Under the evidence defendant was negligent and liable for a failure to warn plaintiff.

It was a question for the jury whether the plaintiff was guilty of contributory negligence or not in riding upon the step; (Alton L. & T. Co. v. Oller, 217 Ill. 15), or in failing to discover the fence which struck him. Smaske v. C. C. Ry. Co., supra; W. C. St. Ry. Co. v. Marks, 182 Ill. 15; I. T. R. Co. v. Thompson, 210 Id. 225. Upon the evidence shown in the record, we cannot find that the verdict was not warranted.

The court admitted evidence tending to show that the car was crowded at the time it was stopped by the wagon at the switch. Under the charges of the declaration this evidence was material. The fact that the car was crowded when stopped by the wagon tended to show its condition at the time of the accident. The evidence also had a bearing upon the question whether the motorman should not have anticipated reasonably that there were passengers riding on the step of the car as it approached the fence who should be warned of the presence of the fence. Appellant was not prejudiced by this evidence. The crowded condition of the car was an undisputed fact in the case. Appellant itself offered evidence of its crowded condition.

Error is assigned upon the giving of the eighth instruction because it refers to "the negligence of the defendant, as charged in the declaration," instead of embodying the facts constituting such negligence.

It is true that the practice of thus referring to the declaration in instructions has been criticised and disapproved, but the giving of such an instruction does not constitute reversible

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error. Sub. R. R. Co. v. Balkwill, 195 Ill. 535; Krieger v. A. E. & C. R. R. Co., 242 id. 544-549.

It is urged that at the request of plaintiff the court submitted instruction 11 erroneously because the only averments in the declaration as to plaintiff's injuries and damages are in the first count of the original declaration which was instructed out of the case. The instruction was not erroneous on that ground. Shaughnessy v. Holt, 236 Ill. 485; Con. C. Co. v. Schneider, 165 Ill. 393.

The court did not err in modifying the twelfth instruction. The court gave, at the request of appellant, at least eight other instructions on the question of contributory negligence which fully covered every phase of that question in this case.

Appellant was not harmed by the action of the court in striking out the word "ordinary" and substituting the word "due" in the sixteenth instruction submitted by appellant. Plaintiff did not cease to be a passenger or lose his rights as a passenger by leaving the car at the motorman's request to help in removing the wagon from the tracks so that the car might proceed. St. Ry. Co. v. Bolton, 43 Ohio State, 224.

We cannot say that the award of \$3,500 is so grossly excessive as to justify this court in setting aside the verdict on the ground that it was manifestly the result of passion and prejudice.

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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REFERENCES

BENJAMIN SCHWARTZ,
Plaintiff in Error,

vs.

ANHEUSER-BUSCH BREWING ASSOCIA-
TION, a corporation,
Defendant in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

182 I.A. 338

MR. PRESIDING JUSTICE F. A. SMITH
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error brought these actions against defendant in error in the Municipal Court of Chicago for rent for three months, July, August and September, 1911, for premises at Indiana Harbor, state of Indiana. These actions were consolidated in the trial court by an order of court entered December 27, 1911. The consolidated cause was heard before the court without a jury. The court found the issues against the defendant in error and entered judgment on the finding for \$10.85. The plaintiff below, plaintiff in error here, seeks by this writ of error to reverse the judgment below.

The actions were based upon a lease which the plaintiff claimed had been renewed after its expiration. The lease provided for a renewal at the option of defendant in error and the claim for a renewal under the option is based upon the giving of a check by defendant in error for the month of June, 1911, and retaining^{of} possession after the lease expired. As to the payment of the June rent, defendant in error showed that the check therefor was issued and sent to the plaintiff in error by mistake; and, as to the retaining possession, it showed that by arrangement with plaintiff in error's agent certain saloon fixtures were left in the premises temporarily. The court struck out the evidence offered to show that the drawing and mailing of the check for the June rent was due to a mistake.

The first and second findings of fact requested by plaintiff in error were refused by the court. The first finding held that defendant in error remained in possession of the premises after the expiration of the lease. The evidence does not sustain this finding, and the court did not err in refusing it.

The second finding of fact held that the check received by plaintiff in error was a payment of the June, 1911, rent of the premises, and that the claim of defendant in error that the check was sent by mistake was not well founded. The court upon the evidence did not err in refusing to hold the finding as tendered.

In our opinion the court correctly refused to hold as a matter of law that the facts proven in evidence constituted a renewal of the lease for one year after the expiration of the written lease.

The fourth holding of law was refused that when a tenancy at will is created by the parties, such tenancy can only be terminated by the tenant upon reasonable notice in writing of the tenant's election so to do, and that there was no notice given. This proposition of law was not involved in the case and the court properly refused to hold it.

No cross errors are filed. The record contains no error of which plaintiff in error can complain. The judgment is affirmed.

AFFIRMED.

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51 - 18488

O. J. ASTRY, Defendant in Error,

vs.

FOX RIVER DISTILLING COMPANY,
a corporation,

Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

182 I.A. 339

MR. PRESIDING JUSTICE F. A. SMITH
DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a judgment for \$517.25, recovered by defendant in error in a fourth class case upon a promissory note, dated October 10, 1910, made by plaintiff in error, payable to the order of Harry P. Teufel, for \$500, nine months after date, with interest at six per cent. per annum, and endorsed by Teufel to defendant in error.

The statement of claim avers that defendant in error is the bona fide holder of the note, and describes it in hac verba with the exception of a memorandum appearing on the back thereof and below all other endorsements as follows: "Will pay as soon as our claim of \$717.13 is satisfactorily settled by Mr. Teufel. Fox River Distilling Company, Charles Ledowsky, Pres't."

Defendant in error rested his case upon the receipt in evidence of the note, and no evidence whatever was offered by plaintiff in error in defense to the action. Motions for a directed verdict were thereupon made by both parties and the trial judge granted that of the defendant in error.

The argument of counsel for plaintiff in error is predicated upon the assumption that the memorandum endorsed on the note was made at the time the maker executed the note. This presumption, we think, is not to be indulged in. It may reasonably be inferred from the apparent repugnancy of the memorandum and its

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Journal of Management Inquiry 18(6)

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location upon the back of the instrument, below all other endorsements, that it was written subsequently to the making of the note by the maker, and, indeed, subsequent to its acquisition by Astry, defendant in error, and at a time when plaintiff in error may have had momentary access to the document upon its being presented for payment through the collection department of a bank. It is true that there is no evidence in the record as to the time of the making of the notation in question. In the absence of such evidence, the presumption is that the memorandum referred to was not endorsed on the note at the time the maker executed the note.

In Bay v. Shrader, 50 Wise, 326, a similar question was presented, and it was held that in the absence of direct testimony words written on the back of a note are no part of the body thereof prima facie, but are presumed to have been made after the note was executed, and that the test of the materiality of such memorandum or endorsement on the back of an instrument is the time, intent and purpose of it. If made at the time of the execution of the instrument, it may be part and parcel of it and may control the obligation in some important particular, and Parsons on Bills and Notes, Vol. 2, page 544, is cited as authority. We think the presumption above stated must be held to apply to the note sued on in this case, and that in the absence of any testimony upon the subject, the notation endorsed upon the back of the note is not a part thereof. Assuming, however, for the sake of argument, that the assumption of counsel for plaintiff in error may be indulged in, that the notation on the back of the note was made at the time of the execution of the note, we are of the opinion that it does not destroy its negotiability or throw upon the defendant in error the burden of establishing compliance with what is said to be a condition precedent contained in the memorandum. The meaning and effect of the document was a question of law for the consideration of the trial judge, and he was called upon to follow the well-established rules in reference to construction of written contracts. He was bound to ascertain the

intention of the parties from a consideration of the whole instrument, and if the note contained ambiguous words or words of doubtful meaning, he was bound to construe them most strongly against the maker of the note. If the plaintiff in error used, over its own signature, language of doubtful meaning, it cannot complain when a construction is made favorable to the other party who is not presumed to have chosen the expression of doubtful meaning. The court was bound to construe the instrument as a whole and to give effect, if possible, to all the words and language used, discarding none, so that if it could be prevented, no clause, sentence or word should be superfluous, void or insignificant. McCarty v. Howell, 24 Ill. 343.

In the McCarty case a promissory note was offered in evidence by the plaintiff, therein providing for payment "four months after date or as soon as I shall be able to collect a certain note against Abram Davis of Chicago," and the defence was made on the theory that the payment of the note was contingent upon the payment of the Davis note to the maker. The court, after discussing the rules applicable to the construction of contracts, held that in order to give effect to the words "four months after date," it was necessary to give to the note the following meaning: "Four months after date, I promise to pay, etc., but if A. Davis of Chicago pays his note to me before that time, I will pay it then, but at all events, I will pay it four months from its date." The McCarty case has been referred to with approval by the Supreme Court in later cases, among them McClenathan v. Davis, 243 Ill. 87. If, therefore, the assumption contended for by plaintiff in error, that the notation endorsed on the note in question is a part of the contract, the true construction thereof would be that nine months after date plaintiff in error promises to pay Harry Teufel \$500 and interest; but if plaintiff in error's claim of \$717.13 against Teufel is satisfactorily settled by him before that time then it will pay the note then, but at all events, it will pay the note in nine months from date.

Any other construction would do violence to the absolute promise of payment appearing on the face of the instrument and would be in disregard of all well-established rules of construction.

The introduction of the note made a prima facie case for defendant in error. The presumption of law obtains that the holder acquired the note for a valuable consideration before maturity and without notice. *Ciene v. Chidester*, 85 Ill. 523; Sec. 77, Chap. 96, Hurd's R. S., page 1529. It is no answer to this position to say that the notation on the back of the note was a notice to Astor of an equity existing in favor of plaintiff in error as against Teufel. Such a notice would be entirely immaterial without proof by the plaintiff in error of the claim alleged in the affidavit of defense to exist as against Teufel. As above stated, no evidence whatsoever proving or tending to prove any such claim, was adduced.

In the absence of any denial of the execution of the note or of the signature of the payee, the execution and the assignment were admitted. Defendant in error was not required to prove the maker's or payee's signatures in the absence of a verified pleading denying execution or assignment. *Walker v. Krebaum*, 67 Ill. 252; Sec. 52 Chap. 110, Hurd's R. S., 1909, page 1701. The trial court properly directed a verdict for defendant in error, and the judgment is affirmed.

AFFIRMED.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the Communist Party in the United States.

THE INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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the date for a possible execution date.

(continued from page 10)

1. The first step in the process of identifying a problem is to determine the nature of the problem. This involves a thorough understanding of the situation and the factors that may be contributing to the problem. Once the problem has been identified, the next step is to develop a plan of action. This plan should outline the steps that will be taken to address the problem and the resources that will be required. The final step in the process is to implement the plan and monitor the results. This involves a continuous process of evaluation and adjustment to ensure that the problem is effectively addressed.

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There have been some 40 different models of automatic washing machines in

and the following will be taken into consideration:

12. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403. 2404. 2405. 2406. 2407. 2408. 2409. 2410. 2411. 2412. 2413. 2414. 2415. 2416. 2417. 2418. 2419. 2420. 2421. 2422. 2423. 2424. 2425. 2426. 2427. 2428. 2429. 2430. 2431. 2432. 2433. 2434. 2435. 2436. 2437. 2438. 2439. 2440. 2441. 2442. 2443. 2444. 2445. 2446. 2447. 2448. 2449. 2450. 2451. 2452. 2453. 2454. 2455. 2456. 2457. 2458. 2459. 2460. 2461. 2462. 2463. 2464. 2465. 2466. 2467. 2468. 2469. 2470. 2471. 2472. 2473. 2474. 2475. 2476. 2477. 2478. 2479. 2480. 2481. 2482. 2483. 2484. 2485. 2486. 2487. 2488. 2489. 2490. 2491. 2492. 2493. 2494. 2495. 2496. 2497. 2498. 2499. 2500. 2501. 2502. 2503. 2504. 2505. 2506. 2507. 2508. 2509. 2510. 2511. 2512. 2513. 2514. 2515. 2516. 2517. 2518. 2519. 2520. 2521. 2522. 2523. 2524. 2525. 2526. 2527. 2528. 2529. 2530. 2531. 2532. 2533. 2534. 2535. 2536. 2537. 2538. 2539. 2540. 2541. 2542. 2543. 2544. 2545. 2546. 2547. 2548. 2549. 2550. 2551. 2552. 2553. 2554. 2555. 2556. 2557. 2558. 2559. 2560. 2561. 2562. 2563. 2564. 2565. 2566. 2567. 2568. 2569. 2570. 2571. 2572. 2573. 2574. 2575. 2576. 2577. 2578. 2579. 2580. 2581. 2582. 2583. 2584. 2585. 2586. 2587. 2588. 2589. 2590. 2591. 2592. 2593. 2594. 2595. 2596. 2597. 2598. 2599. 2600. 2601. 2602. 2603. 2604. 2605. 2606. 2607. 2608. 2609. 2610. 2611. 2612. 2613. 2614. 2615. 2616. 2617. 2618. 2619. 2620. 2621. 2622. 2623. 2624. 2625. 2626. 2627. 2628. 2629. 2630. 2631. 2632. 2633. 2634. 2635. 2636. 2637. 2638. 2639. 2640. 2641. 2642. 2643. 2644. 2645. 2646. 2647. 2648. 2649. 2650. 2651. 2652. 2653. 2654. 2655. 2656. 2657. 2658. 2659. 2660. 2661. 2662. 2663. 2664. 2665. 2666. 2667. 2668. 2669. 2670. 2671. 2672

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89 - 18533

LOUIS ROSENFELD,
Defendant in Error,

vs.

NATHAN POMERANTZ and HARRY
POMERANTZ,
Plaintiffs in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

182 I.A. 341

MR. PRESIDING JUSTICE F. A. SMITH
DELIVERED THE OPINION OF THE COURT.

Louis Rosenfeld, defendant in error, brought an action in the Municipal Court of Chicago against the plaintiffs in error to recover for wages earned by defendant in error, hereinafter called plaintiff, while in the employ of plaintiffs in error, hereinafter called defendants. The wages consist of \$18 due for one week ending December 23, 1911, and the balance are for overtime between August 14, 1911, and the last mentioned date.

The cause was tried before the court without a jury. The court found the issues for the plaintiff and against the defendants, and assessed the plaintiff's damages at the sum of \$153, and judgment was entered upon the finding.

The record shows what is called a "statement of facts" signed by the trial judge. The certificate to the statement is "that the foregoing is a correct statement of the facts appearing on the trial of the foregoing cause, and of all questions of law involved in said cause, and the decision of the court upon said questions of law." An examination of the document shows that it is a statement of the evidence offered in the case on direct and cross-examination of the witnesses. It is, therefore, not such a statement of facts as is contemplated by the Municipal Court Act. It is a statement of the evidence. The record shows that no propositions of law or findings of fact were presented to the judge, be-

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CLERK OF THE COURT

IN THE
COURT OF THE
COMMON PLEAS
OF THE COUNTY OF
OHIO

1821.A.341

THE
COMMONS OF THE
COUNTY OF OHIO

James H. Hays, Plaintiff in error, brought an action
in the Municipal Court of Chicago against the Plaintiff in error
to recover for wages earned by defendant in error, defendant
being plaintiff, while in the employ of plaintiff in error, last-
named called defendant. The record contains of this case for one
with ending December 31, 1911, and the balance for the period
between August 14, 1911, and the last mentioned date.
The case was tried before the court without a jury.
The court found the issue for the plaintiff and against the de-
fendant, and assessed the plaintiff's damages at the sum of \$100,
and judgment was entered upon the finding.
The record above what is called a "statement of facts"
signed by the trial judge. The certificate to the statement is
"that the foregoing is a correct statement of the facts as given
on the trial of the foregoing case, and of all questions of law
involved in said issue, and the decision of the court upon said
questions of law." An examination of the record shows that it
is a statement of the evidence offered in the case as direct and
cross-examination of the witnesses. It is, therefore, not such a
statement of facts as is contemplated by the Municipal Court Act.
It is a statement of the evidence. The record shows that no propo-
sition of law or finding of fact was presented to the judge, and

fore when the cause was tried, prior to the hearing of arguments upon the questions of fact, the findings of the court and the entry of judgment; but that after the entry of judgment and after the writ of error had been sued out in this case, counsel for defendants submitted to the court certain propositions of law to be held as the law of the case and certain findings of fact. These propositions of law and findings of fact the trial court refused to allow to be filed for the reason that they were not submitted until after the judgment had been entered. In this the court did not err. The findings of fact and propositions of law should have been submitted before the finding of the court was made.

There are, therefore, no questions of law presented in the record for review. The only question that may be said to be presented, if the so-called "statement of facts" is to be treated as a part of the record, is the question whether the finding of the court and judgment is against the manifest weight of the evidence. Upon a review of the evidence and the arguments of counsel, we are of the opinion that the judgment is supported by the evidence, and that substantial justice has been done. The judgment is affirmed.

AFFIRMED.

Two when the case was tried, prior to the hearing of arguments upon the question of fact, the findings of the court and the entry of judgment; but that after the entry of judgment and after the writ of error had been sued out in this case, counsel for respondents submitted to the court certain propositions of law to be held as the law of the case and certain findings of fact. These propositions of law and findings of fact the trial court refused to allow to be filed for the reason that they were not submitted until after the judgment had been entered. In this the court did not err. The findings of fact and propositions of law should have been submitted before the filing of the writ of error.

There are, therefore, no questions of law presented in the record for review. The only question that may be said to be presented, is the so-called "question of fact," as to be decided as a part of the record, is the question whether the finding of the court and judgment be against the admitted weight of the evidence. Upon a review of the evidence and the arguments of counsel, we are of the opinion that the judgment is supported by the evidence, and that substantial justice has been done. The judgment is affirmed.

EUGENE BRENNER,

Appellee,

vs.

CITY OF CHICAGO,

Appellant.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

182 I.A. 348

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee, Brenner, while driving to collect receptacles for a brewing company, was injured by falling from his wagon into a hole in the street pavement. He was driving eastward on the south street railway track intending to go down an alley to the rear of the saloon which was on the southwest corner of said street and alley. As he turned out of the track to the south in front of the saloon, one of the wheels went into a hole just outside of the granite blocks lining the south rail. He fell from the wagon and was kicked by one of his mules. The street between the tracks and the curb was paved with cedar blocks, except there was a line of granite blocks next to the car rail.

There was considerable conflict in the evidence as to the exact condition of the street, but the evidence tended very strongly to show that many of the cedar blocks were out, leaving several conspicuous holes in the pavement both in front of the saloon and between the alley and the street railway tracks; that they had been there for several months, and that it was difficult for one driving into the alley to avoid them.

1. But because of appellee's knowledge of such conditions it is urged that he was guilty of contributory negligence. He testified that he intended to drive into the alley, and said, "I looked and turned out and picked out the best spot, the safest spot, and at the same time I heard the sound of a car bell behind me, so I threw my head around and looked backwards and noticed

ATTEST FROM OFFICE
COURT, COOK COUNTY

1891. A. 348



NO. 1011, NORTH SIDE, COOK COUNTY, ILL.

Appellee, however, while driving to collect contributions from a driving company, was injured by falling from his wagon into a hole in the street pavement. He was driving eastward on the south side of the alley, intending to go down an alley to the rear of the wagon when he was on the westward side of the street and alley. As he turned out of the track to the south in front of the wagon, one of the wheels went into a hole just outside of the granite blocks lining the south wall. He fell from the wagon and was kicked by one of his wheels. The street between the blocks and the curb was paved with cedar blocks, except where the curb of granite blocks next to the rear wall.

There was considerable conflict in the evidence as to the exact condition of the street, but the evidence tended very strongly to show that many of the cedar blocks were out, leaving irregular concave holes in the pavement both in front of the wagon and between the alley and the street railway tracks; that they had been there for several months, and that it was difficult for the driving team to avoid them.

1. That because of appellee's knowledge of such conditions it is urged that he was guilty of contributory negligence. He testified that he intended to drive into the alley, and said, "I looked and turned out and kicked out the rear spot, the alley spot, and at the same time I heard the sound of a car wheel behind me, so I threw up my hand around and looked backward and realized

that there was a car just passed me. * * * When I straightened up, turned around again and pulled out of the track, my wagon went into a hole and I fell right off." Several cases are cited to support the contention that where a hole is easily visible or one knows of it, it is negligence for him to drive or walk into it. But it was not negligence per se for appellee to use the street because he had notice of its defective condition. (City of Mattoon v. Faller, 217 Ill. 273; Wallace v. City of Farmington, 231 id. 232). One witness familiar with the location testified that the holes could not be avoided except by driving on the track. They were in the way of appellee's destination, and just as he was seeking the "safest spot", as he said, his attention was diverted by a car bell which he took for that of a car approaching behind him and to which he would be bound to give the right of way. In order to look back, the construction of the wagon-hood required him to lean forward and look along its sides or stand up. There was some controversy as to which he did. While an attempt was made to impeach him and his helper on the matter, both testified that he kept his seat and leaned forward.

While after examining the entire evidence, we recognize that it presents a close question of fact as to appellee's exercise of due care for his own safety, we think that where, as in this case, the evidence tends to show that the street was full of holes at a point where a party had occasion and lawful right to use it, and that he drove into one of them while looking for the safest place and at the same time exercising care to avoid another trouble incident to street travel, it presents a pure question of fact upon which the finding of the jury should not be disturbed. The negligence of the city was apparent, but we cannot say that as to appellee's exercise of ordinary care the verdict was manifestly against the weight of the evidence.

2. The notice given by appellee to the city under

that there was a car just passed me. * * * When I observed it, I turned around again and pulled out of the track, my right hand into a hole and I fell right off. Several persons were called to assist the contention that there is a hole in the wall in the track. It is negligence for him to have on his left hand that it was not negligence and for speaking to him the witness. He had notice of its defective condition. (City of Chicago v. Taylor, 219 Ill. 273; Taylor v. City of Chicago, 221 Ill. 273). One witness familiar with the location testified that the hole would not be avoided except by driving on the track. It was in the way of speaker's destination, and just as he was about to "start" again, as he said, the attention was directed by a car which he took for that of a car approaching behind him and which he would be bound to give the right of way. In order to pass back, the construction of the wagon-horn required him to pass forward and look along the side of the car. There was some testimony as to which he did. While an attempt was made to impeach him and his helper on the matter, both testified that he kept his seat and looked forward.

While after examining the entire evidence, we recognize that it presents a close question of fact as to speaker's knowledge of the care for his own safety, we think that where, as in this case, the evidence tends to show that the street was full of holes at a point where a party had reasonable and lawful right to use it, and that he drove into one of them while looking for the subject of the case and at the same time endeavored to avoid another trouble incident to street travel, it presents a pure question of fact upon which the finding of the jury should not be disturbed. The negligence of the city was apparent, but we cannot say that as to speaker's exercise of ordinary care the verdict was manifestly against the weight of the evidence.

2. The notice given by speaker to the city under

the statute states that the accident occurred "on or about the 3rd day of December, 1908." It is contended that the use of the words "on or about" does not meet the mandatory requirement of the statute to give the exact date. While, in view of the statutory requirement, the words "or about" have no efficacy, their use did not change the fact that the notice specified that the accident occurred on the correct date. In that respect it met the purpose of the statute, especially in the absence of any showing that the city was misled thereby. Notices with the same phraseology, given under similar statutes, have been held a sufficient compliance with them. (Comstock v. Village of Schuylerville, 138 N. Y. App. Div. 378; Stearn v. City of Rome, 95 N. Y. Sup. Ct. (88 Hun) 275; Connor v. Salt Lake City, 28 Utah, 242.)

3. It is also urged that the notice is indefinite as to place. It designates the street on which and the two nearest intersecting streets between which the accident occurred, and describes the nature of the defect causing it. There would be no difficulty in finding therefrom such a condition as is described if existing, and again it meets the purpose of the statute which is not designed to embarrass the plaintiff in asserting his rights, but to enable the city to locate the alleged point of danger and make timely investigation of the facts. Various decisions in other jurisdictions to the same effect other than some above cited, construing like notices under similar statutes, might be referred to, but we think it unnecessary.

4. Complaint is also made that an instruction which properly states what would constitute constructive notice of an unsafe condition assumes controverted facts of the case to be proven. The same objection to the same form of instruction was held untenable in Graham v. City of Rockford, 232 Ill. 214;

5. The amount of the verdict was \$10,000. It is urged that it was excessive. The injuries were permanent and severe, attended by pains and always will be. There was a con-

ound comminuted fracture of the tibia of the left leg, leaving a roughened condition caused by spiculae sticking out from the fracture; the ankle was ankylosed; the foot was edematous, into which the blood settled at times; the muscular tissue of the back of the leg had sloughed off and the scar tissue had so contracted it that it was impossible to get the heel to the floor; the scar on the heel extended up the leg about four inches and involved all the tissues in that part so that they were immovable; the leg was two inches shorter than the other and two inches smaller around the calf; appellee was laid up about eight months, at first using crutches, and still using a cane to get about. He was also hurt in the groin, probably by a kick of one of his mules, and had a perforation through the leg which necessitated long treatment, and gangrene was developed. While the verdict was large, it is difficult to say that under such circumstances it was excessive. Neither law nor precedent has fixed any standard for such matters other than what may be deemed reasonable compensation. As said in *Village of Wilmette v. Brachle*, 110 Ill. App. 358, a court of review seldom sets aside the finding of a jury on the sole ground that it is excessive unless the amount is so great as to shock its sense of right. We cannot say that it does in this case.

6. Objections were made to certain hypothetical questions put to medical experts, and error is assigned to the overruling of such objections. They assumed several facts with reference to the injuries and health of appellee and concluded with the question whether the witness had an opinion as to whether the physical conditions described were caused by the accident; for instance, gangrene, the sloughing of the tissues, the stiffening of the ankle, the shortening of the leg, all matters of expert knowledge. The answer was in the affirmative and that they were due to the accident.

The manner of the accident was not questioned. The de-

found continued fracture of the tibia of the left leg, leaving a
strengthened condition caused by splinting extending out from the
tibia; the tibia was unbroken; the foot was unbroken; the
ankle the blood settled at (back); the remaining blood of the
leg of the leg had absorbed it and the foot found no bone
fracture it that it was impossible to get the bone to the foot;
the bone on the back extended on the leg about four inches and the
joint all the distance in that part so that they were immovable;
the leg was two inches shorter than the other and two inches
smaller around the calf, the leg was laid up about eight weeks;
at that time splinted, and still using a cane to get about.
We were also hurt in the groin, probably by a kick of one of his
kicks, and had a perforation through the leg which necessitated
leg treatment, and surgery was required. While the perforation
was large, it is difficult to say what under such circumstances
it was necessary. Neither leg was fractured but that leg
without the back splint which then was by the doctor's order.
This complication. It is said in Village of Webster v. Webster,
123 Ill. App. 588, a number of other cases were cited the finding
of a jury on the facts found that it is necessary unless the wound
is so great as to shock the sense of right. We cannot say that it
was in this case.
7. Objections were made to certain hypothetical ques-
tions put to medical experts, and error is assigned to the over-
ruling of such objections. They assumed several facts which were
given to the jury and failed to explain and connect with
the question whether the witness had an opinion as to whether the
toxic condition described was caused by the accident; for in-
stance, regarding the quantity of the witness, the testimony of
the witness, the character of the leg, all matters of expert know-
ledge. The answer was in the affirmative and that they were not
to the accident.
The answer of the accident was not questioned. The an-

fense was directed mainly to the condition of the street and the claim of contributory negligence. On cross-examination of appellee's experts, unsuccessful effort was made to show that some of the conditions referred to in the questions might have resulted from a previous attack of sciatica and others from drinking habits. But there was no claim by appellee that such as might have some relation to the latter were other than transient, or proof by appellant that the conditions inquired of had relation to any other cause than the undisputed accident. In view of these facts the case seems to be one within the class recognized by the Supreme Court where a question in that form may be properly answered by an expert. (City of Chicago v. Didier, 227 Ill. 571; Chicago Traction Co. v. Roberts, 229 id. 481, People v. Hagenow, 236 id. 514; Fuhry v. Chicago City Ry. Co., 239 id. 545.)

7. The further contention that there was no proof that the street in question was a public thoroughfare need not be considered at length. There was no formal proof of the fact. But it plainly appeared from all the evidence that it was a city street and must have been accepted as such. It was paved and used by pedestrians and for traffic and street cars, and was patrolled by city officers. Its existence as a street was not questioned at the trial, the entire defense proceeding upon the theory that it was such, and it was so referred to. If it was not inferentially admitted to be such, the proof was prima facie sufficient to show it.

We find no reversible error and the judgment will be affirmed.

AFFIRMED.

[illegible]

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252-17786

MARY SASS,

Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY,

Defendant in Error.

ERROR TO CIRCUIT

COURT, COOK COUNTY.

182 I.A. 364

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Mary Sass, brought suit against defendant in error to recover damages for a personal injury alleged to have been received while she was boarding one of defendant's cars. It was charged that there was negligence in causing the car to be suddenly started or violently jerked without warning to her while she was on its platform and about to enter it. The verdict was for defendant.

Complaint is made of the instructions. Number twenty-two, given at defendant's request, included the following:

"The law recognizes that a street car, such as is involved in this case, cannot in its very nature, be started without causing some sudden motion and jerking thereof. Such motion or jerking which is practically inseparable and reasonably to be expected from this mode of travel, are assumed by a passenger at his or her own risk as a part of his or her contract of carriage."

The motorman, testifying in behalf of defendant, said, "If you start a car slow, it never jerks." Yet the instruction improperly told the jury that the fact was otherwise. They had the right to consider such evidence in determining whether or not there was any negligence in causing the car to be jerked, if they believed it was. But the instruction practically told them to disregard such evidence as not true.

But whatever may have been the fact, we cannot concur in the application of the doctrine of assumed risk to the relationship of carrier and passenger. The questions for the jury were

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whether defendant was negligent as alleged, and whether plaintiff exercised ordinary care to avoid injury. Whether defendant was negligent was to be determined by application of the familiar rule of care due from a common carrier to a passenger. The defendant could not be relieved from failure to exercise such care on the theory of assumption of risk by plaintiff. So far as plaintiff was concerned, it was merely a question whether she exercised ordinary care for her own safety. If the jury believed that plaintiff was injured from starting or moving the car with a sudden jerk, then, in view of the motorman's testimony, they should have been left free to determine from all the evidence whether it was a negligent act. The instruction not only encroached upon the province of the jury in finding an important fact, but minimized its effect by telling the jury that the passenger assumed the risk of it. It had a tendency to divert the minds of the jury from consideration of the questions of negligence and due care by improperly directing consideration of whether the jerk was of such a character that the passenger assumed the risk of it.

Complaint is also made of instructions relating to contributory negligence. There was no evidence of anything plaintiff did or neglected to do that tended to show contributory negligence. Yet several instructions carried a strong intimation to the jury that it was one of the controverted facts of the case. They were properly told by number thirteen that the burden of proof rested upon the plaintiff to show, as alleged in her declaration, that at the time of and before the happening of the accident she was exercising ordinary care for her own safety. From her circumstantial account of the accident, due care on her part could be inferred without express proof thereof. There was no evidence that she did not exercise ordinary care. It was wholly unnecessary therefore to repeat the same doctrine in another form in instruction fifteen, by telling the jury that if plaintiff did not prove the

whether defendant was negligent or not, and whether plaintiff
received ordinary care to avoid injury. Whether defendant was
negligent was to be determined by application of the familiar rule
of care due from a common carrier to a passenger. The defendant
could not be relieved from failure to exercise such care on the
ground of assumption of risk by plaintiff. So far as plaintiff
was concerned, it was merely a question whether the defendant
negligently care for her own safety. It the jury believed that
plaintiff was injured from falling on board the car with a child
on foot, then, in view of the defendant's testimony, they should
have been left free to determine from all the evidence whether it
was a negligent act. The instruction was only concerned upon
the question of the jury in finding an important fact, but plaintiff
objected by saying the jury that the passenger assumed the risk
of it. It had a tendency to divert the mind of the jury from
consideration of the questions of negligence and the care by in-
correctly directing consideration of whether the fact was or was
not negligence that the passenger assumed the risk of it.
Complaint is also made of instructions relating to
plaintiff's negligence. There was no evidence of anything
plaintiff did or neglected to do that tended to show contributory
negligence. Yet several instructions carried a strong intimation
to the jury that it was one of the undisputed facts of the case.
They were properly told by member thirteen that the burden of
proof rested upon the plaintiff to show, as alleged in her declara-
tion, that at the time of and before the happening of the accident
she was exercising ordinary care for her own safety. From her
disinterested account of the accident, the jury on her part could
be induced without express proof thereof. There was no evidence
that she did not exercise ordinary care. It was wholly unnecessary
therefore to repeat the same doctrine in another form in instruction
eleven, by telling the jury that if plaintiff did not prove the

allegation by a preponderance of evidence, they must find the defendant not guilty. We might not refer to the emphasis thus given to the negative of an uncontroverted fact if other instructions, repeating the principle and laying increased emphasis on the subject, had not been given.

Number sixteen again told the jury what care and prudence one must exercise for his own safety and that it must be proportionate to the danger if any surrounding the person at the time, etc., and added that if the jury find that "the plaintiff, by the exercise of such degree of care on her part at the time in question, would have avoided or escaped the injury and that she failed to exercise such care as thus defined, then she cannot recover," and they should find the defendant not guilty.

By instruction number seventeen, the attention of the jury was again invited to the subject of contributory negligence and they were told that they could not compare the negligence of the plaintiff with that of defendant, for if negligent she could not recover and the defendant should be found not guilty.

The numerous instructions on this subject must have led the jury to infer and believe that the court thought that contributory negligence was a serious question in the case, and, being told by the court that a car could not be started without causing some sudden action or jerking and that a passenger assumed that risk, the jury was likely to look beyond the evidence for some particular thing plaintiff neglected to do to protect herself from injury. In the absence of any circumstances or proof from which contributory negligence could be properly inferred, the repeated intimation of its importance was unwarranted and prejudicial.

Just complaint is also made of numerous instructions given at the instance of defendant, each of which, after stating that upon certain hypotheses plaintiff could not recover, unnecessarily added the inevitable conclusion that the jury "should

that has not been given.

That should find the defendant not guilty.

cover and the balance should be found not guilty.

The numerous instructions on this subject have led the Court to believe that the Court should consider every negligence was a serious question in the case, and, being told by the Court that a case could not be stated without causing some sudden action or feeling and that a passenger cannot take risk, the Court was likely to have taken the evidence for some particular thing plaintiff requested it to be stated because of injury. In the absence of any circumstances on which which conclusively negligence could be properly inferred, the requested instruction of the instruction was unnecessary and prejudicial.

Just outside the city of New York, in the town of
Yonkers, there is a large, old, brick building
which was built in 1880, and which was
used as a warehouse for the storage of
goods. It is now used as a warehouse for
the storage of goods.

find the defendant, Chicago City Railway Company, not guilty." Twelve of the twenty-five instructions given at defendant's request, ten of them with one exception being the last read, concluded with this stereotyped expression, and were apparently presented with studied effect of such reiteration. In Nelson v. Chicago City Railway Co., 163 Ill. App. 98, we said of similar instructions that "they were well calculated to impress the jury with the thought that the court was against the plaintiff on the question of fact, and that they might readily be misled to believe that in the opinion of the court they should find for the defendant."

The misleading and prejudicial character of the instructions referred to require reversal of the judgment and remanding of the cause for a new trial.

REVERSED AND REMANDED.

that the defendant, Chicago City Railway Company, had failed to
Twice in the twenty-five instructions given at defendant's re-
quest, one of these with one exception being the last one, and
which with this exception appeared, and was apparently
intended with similar effect of your instructions. In relation to
Chicago City Railway Co., the law, we are not aware
instructions that "they were well calculated to prevent the jury
with one exception that the court was against the plaintiff in the
question of fact, and that they might readily be misled to believe
that in the opinion of the court they should find for the defendant."
The misleading and prejudicial character of the in-
structions related to the fact of payment of the judgment and to
wronging of the judge in a new trial.

STANDARD AND REMARKS.

The first instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The second instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The third instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The fourth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The fifth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The sixth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The seventh instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The eighth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The ninth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The tenth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The eleventh instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The twelfth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The thirteenth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The fourteenth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The fifteenth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The sixteenth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The seventeenth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The eighteenth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The nineteenth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.
The twentieth instruction was a statement of the facts of the case, and was
correctly stated, and was not misleading, and was not prejudicial.

365 - 17901

PETER J. KANE,

Appellee,

vs.

W. M. HOYT COMPANY, a corp.,
Appellant.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

182 I.A. 371

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment for \$2850 for personal injuries sustained while in the employ of appellant, caused by the fall of a freight elevator which he was operating.

The declaration charged that appellant furnished appellee a defective elevator to operate; that the pinion, a small cogwheel transmitting the power to the drum, was cracked and broke, and that a bar, part of the safety device, was bent and prevented the dogs from working and stopping the car in its descent.

It is urged by appellant that the defect in the pinion, if any, was latent, not discoverable by the usual methods of inspection, and that there was insufficient proof that the bar was bent prior to the accident.

The direct cause of the accident was more or less a matter of speculation, but apparently was the breaking of the pinion. The principal evidence upon which the charge of negligence rests is the fact that the bar was bent as aforesaid, and the testimony of one witness that the pinion bore indication of an old break or crack at the point of breakage. The elevator and its various parts had frequently undergone the usual tests of inspection, periodically by city inspectors and daily by appellant's engineer. The tests employed were those usual and customary, viz., visual and by striking the pinion with a hammer, called the "hammer test." The fact that the pinion worked in grease rendered

1821.A.371

THE UNITED STATES DEPARTMENT OF THE INTERIOR

On the 1st day of January, 1883, the following was received from the
Inspector of the Mine in the employ of the United States, caused by
the fall of a freight elevator which was operating.

The destination changed and a different furnished

was given a defective elevator to operate; that the station, a
small rope-hoist transmitting the power to the drive, was coupled
and broke, and that a bar, part of the safety device, was bent
and prevented the rope from working and stopping the car in its
descent.

It is urged by applicant that the defect in the station
is any, was latent, not discoverable by the usual methods of in-
spection, and that there was insufficient proof that the bar was
bent prior to the accident.

The direct cause of the accident was not a fault in
matter of construction, but apparently was the breaking of the
station. The principal evidence upon which the charge of negli-
gence rests is the fact that the bar was bent so seriously, and
the testimony of one witness that the station had indication of
an old piece on which at the point of breaking. The elevator and
its various parts had frequently undergone the usual tests of in-
spection, periodically by city inspectors and daily by applicant's
engineers. The tests employed were those usual and customary, viz.,
visual and by striking the station with a hammer, called the "bar-
test." The fact that the station worked in previous months

neither entirely satisfactory. There was testimony, however, that the parts were wiped for visual inspection and that no other method than such tests could be employed except by taking the machinery apart. The elevator had been in service for about fifteen years. There was testimony that a crack or break might occur after several years from crystallization, but also that a pinion might be expected to render service for even thirty or forty years. No defects had been discovered from the inspection, and not until a few minutes before the accident, when appellant's engineer examined the elevator for the purpose of ascertaining the cause of its jerking, did appellant have notice of anything defective about it. The engineer then inspected it, tightened some bolts and thought it was all right. A trial was made, and the next time it descended it fell. Not until after the accident were the defects referred to found. That the bar was bent prior to the accident was not proven and the inference that it was bent by the accident is as reasonable as that it was bent before. Nor in our opinion was there a preponderance of evidence that the pinions bore traces of an old crack or break, or, if so, that it would have been detected by the usual method of inspection; nor that the appellant was so negligent in its inspections that it became chargeable with notice of an old break, if it existed. While we are unable to say, as a matter of law, that appellant was not negligent, we are of the opinion that the verdict was against the manifest weight of the evidence.

But we think there was reversible error in the proceedings. There was much conflict in the evidence as to the extent of the injury. Appellee suffered from a comminuted fracture of the knee-cap. One of his medical experts testified that the result of the operation was a fibrous and not a bony union. A medical expert for appellant testified that in his judgment it was a bony union, but that it could not be determined positively. The opinion of each was based on physical examination. Three of the

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jurors, at the request of appellee's counsel and against appellant's objection, were permitted to make such an examination. They felt of and manipulated the knee-cap, manifestly to enable them to form an opinion for themselves and the other jurors. The evidence tended to show that the result of a fibrous union was more serious than that of a bony union, and that even an expert cannot tell whether it is one or the other. In view of such evidence, the conflict of the testimony as to the extent of the injury, and the uncertainty of the effect of permitting such examination by the jurors, we think it was reversible error to permit them to make such examination. It was a subject for expert testimony and about which those called as experts differed. Presumably the three jurors were not experts in such matters, and whatever opinion they may have reached from their examination, whether improperly imparted to the others or not was tantamount to admitting not only incompetent evidence, but testimony without the privilege of cross-examination.

The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

425 - 17965

THE EMPLOYERS' LIABILITY AS-
SURANCE CORPORATION, LIMITED,
of London, England,

Appellee,

vs.

KELLY-ATKINSON CONSTRUCTION
COMPANY, a corporation,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

182 I.A. 372

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$38,365.36 for premiums and interest thereon, claimed by appellee under certain policies for casualty insurance, indemnifying appellant against loss from certain liability to its employees or the public.

Appellant urges (1) that the policies are champertous and void; (2) that all except two of them are ambiguous and without consideration as to premiums not paid; (3) that as to most of the policies, appellee, by failure to object to pay-rolls furnished by appellant in order to fix the premiums, is by its lack of diligence now estopped from objecting thereto; (4) that the statute of limitations had run; and (5) that the court erred in taking the case from the jury and directing a verdict for plaintiff. We shall briefly consider the points in the order named.

1. The clauses in all the policies, except two, relied upon as illegal are as follows:

"If thereafter any suit is brought against the assured to enforce a claim for damages * * * the corporation will at its own cost defend against such proceeding in the name and on behalf of the assured, or settle the same, unless it shall elect to pay to the assured the indemnity," etc.

"The assured shall not settle any claim except at his own cost; nor incur any expense, nor interfere in any negotiations for settlement or in any legal proceeding, without the consent of the corporation previously given in writing."

Similar clauses in the other two policies vary slightly from such phraseology, but not materially as to the question involved.

422 - 17082

THE EMPLOYERS' LIABILITY AS-
SOCIATION CORPORATION, LIMITED,
OF LONDON, ENGLAND,

Respondent,

vs.

THE LONDON & NORTH-OCEANIC STEAMSHIP COMPANY, LIMITED,
OF LONDON, ENGLAND,

Plaintiff.

APPEAL FROM JUDGMENT

IN THE SUPREME COURT

1831.A.373

WE, THE JUSTICE OF THE PEACE, HEREBY ORDER THAT THE COSTS OF THE TRIAL

BE PAID BY THE PLAINTIFF TO THE DEFENDANT FOR THE COSTS OF THE TRIAL

AND INTEREST THEREON, CLAIMED BY THE PLAINTIFF UNDER CERTAIN

ARTICLES OF ASSOCIATION, AND INTEREST THEREON, AND THE COSTS OF THE TRIAL

AND INTEREST THEREON, CLAIMED BY THE PLAINTIFF UNDER CERTAIN

ARTICLES OF ASSOCIATION, AND INTEREST THEREON, AND THE COSTS OF THE TRIAL

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AND INTEREST THEREON, CLAIMED BY THE PLAINTIFF UNDER CERTAIN

ARTICLES OF ASSOCIATION, AND INTEREST THEREON, AND THE COSTS OF THE TRIAL

AND INTEREST THEREON, CLAIMED BY THE PLAINTIFF UNDER CERTAIN

ARTICLES OF ASSOCIATION, AND INTEREST THEREON, AND THE COSTS OF THE TRIAL

1. The amount in all the policies, except two,

shall upon the happening of the event

be payable to the insured or to his estate or to his assigns

or to the person or persons who may be entitled to the proceeds

of the policy, or to the person or persons who may be entitled to the proceeds

of the policy, or to the person or persons who may be entitled to the proceeds

of the policy, or to the person or persons who may be entitled to the proceeds

of the policy, or to the person or persons who may be entitled to the proceeds

of the policy, or to the person or persons who may be entitled to the proceeds

The specific contention is that these clauses take from the assured control of its own litigation and the right to compromise or settle the same except at its own cost, which brings the penalty of losing the benefits of its contract and, therefore, are against public policy.

Whether or not the opinion in *Bresden v. Frankfort Marine Accident & Plate Glass Insurance Co.*, 119 S. W. Rep. 578, (Supreme Court of Missouri, 1900), in which this question is fully and ably discussed, be obiter dictum, as contended by appellant, we think its reasoning sound and hold that ^{the} insurer's liability under the policies gives an interest in the litigation affecting it, which removes the provisions complained of from the application of the doctrine of champerty and maintenance.

But it is urged that the interest is acquired through the policy itself. Nevertheless, the primary purpose of the policy is not litigation or an interest therein, but indemnity, which the law authorizes it to provide. The legality of casualty insurance is not questioned, and a clause for the right of the insurer to defend at its own cost against a claim, for which otherwise it might unjustly be held liable, is, we think, a proper incident thereto. We think this view is in harmony with the prevailing opinion on this subject, which discloses a relaxation of the rigor of the common law in the application of the doctrine to the developed forms of modern business of which casualty indemnity has so generally become a feature.

2. The premium paid on issuance of the policies was based upon the amount of the pay-roll as estimated at the time of the application for insurance, but the policies provided that if the pay-roll, during the period of insurance, should exceed or be less than that amount, a proportionate sum was to be paid by the assured as additional premium or refunded to it, as the case might be, except that a minimum premium was provided for. In accordance with their provisions, when adjustments were made a statement of what purported to be the total wages was submitted by the assured

and it either paid the additional premiums or received the rebates they called for. The construction of the policies, insisted upon by appellee, was thus adopted by the assured, and it cannot now be heard to urge as against its own conduct, by which it recognized its obligation to pay additional premiums and accepted benefits in the form of rebates, the contention that the provisions of the policies, upon which such course of dealing was based, were uncertain and ambiguous. The court will abide by the construction placed upon the contract by the parties. (Mueller v. Northwestern University, 196 Ill. 336; People v. Murphy, 119 id. 159; Burgess v. Badger, 124 id. 288.)

As to the question of consideration and alleged ambiguity as to liability, when the pay-roll exceeded the estimate, it is enough to say, that for the consideration named in the policies the obligation to indemnify manifestly continued during the time the policies were in force, and that the estimated pay-roll was not regarded as limiting it.

3. We find nothing in the case that supports the doctrine of estoppel. The pay-rolls submitted by the assured to appellee for the purpose of ascertaining whether an additional premium should be paid or rebate made, purported to be correct and were accepted as such. The evidence discloses nothing until just before suit that led appellee to question their accuracy or put it on inquiry. To be sure, it had the right, under the policies, to examine appellant's books. It also had the right to believe the assured was acting in good faith and to rely on what purported to be truthful statements until it was put upon notice to the contrary. It would be a strange doctrine to hold a party guilty of lack of diligence who does not assume or suspect fraud where the nature of the business relation invites the confidence given. Appellee was not obligated to verify appellant's reports, which it contracted to furnish, merely because the policies gave the former the right to examine the latter's books. Not until a party is put upon notice

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It is the function of the Commission to investigate and report on the activities of the Communist Party, and to recommend to the President and the Congress such action as may be warranted in the public interest.

. It will be used as follows: The use

[illegible]

and inquiry does the question^{of} lack of diligence arise. We do not find that appellee had any occasion to question the integrity of the statements submitted by appellant until shortly before the suit was begun.

4. It is claimed that as to the assured the contracts were not in writing and that therefore the statute of limitations pleaded applies. The suit was brought within ten but not within five years. The policies plainly indicate the parties thereto and their mutual obligations; the terms and conditions thereof are plain, unequivocal and apparently fair, and the contract is complete in every respect without the necessity of resorting to parol testimony. Although not signed by appellant, it accepted the contract, assented to and acted upon its terms and conditions, and, therefore, is bound by it. Such a contract is deemed a written one within the meaning of the statute. (*Ames v. Moir*, 130 Ill. 582; *Plumb v. Campbell*, 129 id. 131; *Memory v. Niepert*, 131 id. 823; *Forthman v. Deters*, 208 id. 159; *Ulleperger v. Meyer*, 217 id. 269.)

5. For none of the grounds thus considered can the case be reversed. But it is plain that the court erred in directing a verdict for plaintiff. Regardless of any motive that may have existed for the destruction of most of appellant's books and papers pertaining to the matter, and whether or not its officers made misrepresentations with respect thereto, the evidence upon which appellee relied to determine the total amount of wages, where it was unable to produce better evidence thereof, consisted of testimony of the witness Siarts, appellant's former bookkeeper, as to his alleged recollections as refreshed from private memoranda of the pay-rolls, purported to have been made and kept by him, for his own information and convenience. Regardless of whether or not he was properly permitted to state his recollections by reading therefrom as he apparently did in many instances, the question at issue was whether or not the total wages as testified to by him were correct. Appellant's secretary, Mr. Fife, who submitted

statements of the amounts of the pay-rolls to appellee by which the premiums were adjusted, testified that he made them out correctly and that they were all reported to appellee. The original documents as to many of them were missing, hence the resort to secondary evidence. The ultimate facts for decision, therefore, on the evidence produced were whether the total wages called for by each policy were correctly reported, and what were their aggregate amounts. The record presents a conflict on these matters, - the testimony of Sierts tending to show the existence and amounts of pay-rolls never reported, and that of Fife, who made all pay-rolls to the effect that all were reported and correctly.

While it is true that Sierts' recollections or memoranda, as the case may be, conformed to such original pay-rolls and timebooks as were produced by appellee through a writ of replevin and tended to establish the existence and correctness of pay-rolls that had not been reported, yet as to whether there were any pay-rolls than those reported neither his credibility nor that of Fife, nor the weight of their evidence were questions for the court on consideration of the motion to direct a verdict. The weight and credibility of Sierts' testimony, after a cross-examination, tending to disclose bias, interest and possibly ulterior motives for keeping such memoranda, his ability to remember a long array of figures independently thereof as claimed by him on direct examination, but which without consulting the memoranda he could not remember on cross-examination, and the credibility of Fife's testimony, which however open to attack could hardly be said to contain inherent improbabilities, presented questions for the jury to decide and not the court.

It is not necessary, at this late date, to cite decisions in support of this conclusion. But on the question alone as to Sierts' testimony based upon his memoranda reference may pertinently be made to the able discussion of this class of testimony in *Diamond Glue Co. v. Wietaychowski*, 237 Ill. 338, on

statements of the accounts of the pay-rolls is negative as to the
the procedure was suggested, detailed and to make them out and
results and that they were all reported in accordance. The subject
statements as to many of them were missing, hence the report is
entirely erroneous. The ultimate facts for inclusion, however,
on the evidence produced and under the rules were called in
by each party were carefully examined, and what were really agree-
ments. The record contains a number of these statements,
the testimony of Elmer leading to show the evidence and accounts
of pay-rolls never reported, and that of Will, who made his pay-rolls
in the effect that all were reported and correct.

While it is true that Elmer's testimony is not
correct, as the facts are, contained in such original pay-rolls and
statements as were produced by Elmer, it is a matter of evidence
and cannot be established by the testimony of Elmer's
that had not been reported, yet as in relation to the pay-rolls
Elmer also testified under his oath that he had not reported
nor the subject of these statements was material for the court in
determination of the motion to direct a verdict. The subject of
credibility of Elmer's testimony, after a cross-examination, leads
me to believe that, indeed, his testimony is not reliable for
purposes such as these, his ability to produce a good copy of
documents independently thereof as claimed by him in direct examina-
tion, but when Elmer's statements are examined he would not
produce an exact reproduction, and the credibility of Elmer's testi-
mony, which however open to attack would hardly be said to com-
tain inherent improbabilities, presented questions for the jury
to decide and not the court.

It is not necessary, as this fact was in this case
shown in support of this conclusion. But on the question of
it is Elmer's testimony, and upon his testimony evidence was
presented for the jury to decide the facts of this case. It
testimony in Elmer's case, as in the case of the other, on

page 347. The court there states that a witness would be permitted to make use of a memorandum made under certain circumstances "provided the writing is produced with an opportunity for cross-examination as to it so that the jury may also draw their conclusion as to the fact."

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

October Term, 1911, No.

283½ - 18208

JENNIE H. SWEETH, Appellee,

vs.

MICHAEL ZIMMER, Sheriff of Cook County, Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

182 I.A. 374

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in replevin. At plaintiff's request, the court instructed the jury to find for plaintiff as to part of the property replevined and for defendant as to the remainder, and to assess plaintiff's damages at one cent, but the judgment as entered failed to provide for the return of property to defendant in accordance with the verdict. The property had been levied on by defendant, as sheriff, under an execution on a judgment against plaintiff's husband, and the main question on this appeal is whether or not the property so directed to be returned to plaintiff belonged to her or her husband.

The evidence showed that part of it was her property before marriage and part of it was acquired by her after marriage with money that had been given to her by her husband before rendition of the judgment under which the levy was made, and there were no circumstances tending to show any fraud or bring in question their good faith in these transactions, or proof that he was insolvent at the time thereof. On the contrary the evidence showed that the money was given to her when her husband's income was large, before he became involved, and under circumstances which made her

1891 A. 374

1891 A. 374

1891 A. 374

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1891 A. 374

title clear to the money and goods purchased with it.

We do not think the clerk's misprision in his failure to write up the judgment to conform to the verdict as to the property awarded to defendant should call for reversal of the judgment, for in that respect it does not involve property here in controversy, and may at any time be amended from the face of the record.

It is urged that the suit should have been dismissed because the replevin bond ran to the sheriff instead of the coroner who served the writ. The giving of the bond was not a condition precedent to the commencement of the suit. Its purpose was to protect the officer serving the writ. He might have required a different bond, but the fact that he did not furnishes no ground for dismissal of the suit.

It is urged too that no demand was made for the return of the property before bringing the suit. Defendant was advised, both by plaintiff and her husband, at the time the levy was made that the property belonged to her and not to the execution debtor. It was in her possession and her house. Defendant took possession of it with full notice of plaintiff's title, and no demand under such circumstances was necessary. (*Greenberg v. Stevens*, 219 Ill. 608.)

It is contended that it was error to give a peremptory instruction for the plaintiff because the question of credibility of witnesses in the case was one exclusively within the province of the jury, and that the court had no right to take that question from them. This is unquestionably true when it comes to directing or charging the jury thereon in a case requiring submission to them, as held in *Chicago Union Traction Co. v. O'Brien*, 219 Ill. 303, cited by appellant on this proposition; but when the facts are uncontroverted and there is nothing in the evidence tending to impeach or contradict the testimony of witnesses in respect thereof

no question of credibility arises. The question of fact here was, had plaintiff a valid title to the property taken from her possession under the writ of execution. There was no competent evidence tending to establish the negative. The testimony supporting her title was positive and unqualified with no fact or circumstance tending to impeach it, and hence there was nothing with respect thereto for submission to the jury.

The judgment will be affirmed without prejudice to the right of defendant to move for an amendment thereof so far as the record shows from the verdict that it should have included the return of certain property to him.

AFFIRMED.

no question of credibility arises. The question of fact here was, not whether a valid title to the property taken from her husband was shown by the wife or execution. There was no competent evidence tending to establish the negative. The testimony suggested the issue was positive and unqualified with no fact or circumstance leading to impeach it, and hence there was nothing with respect thereto for submission to the jury.

The judgment will be affirmed without prejudice to the right of defendant to move for an amendment thereof so far as the record above shows the verdict that it should have included the return of certain property to him.

AFFIRMED.

39-18473

THOMAS PEDROFF,
Defendant in Error,
v.
TONY VASIL, STEVE SERRINOFF
and GEORGE NICHOLA,
Plaintiffs in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

182 I.A. 375

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Suit in the court below was brought to recover wages. In their affidavit of merits defendants claimed that plaintiff was their partner by virtue of a contract, the substance of which purported to be set forth therein. The principal error assigned is that contrary to the law and evidence the court found the plaintiff was not a partner under said contract. The so-called statement of facts, which is certified to as such and likewise as containing all the evidence, does not contain said contract, and therefore the question is not strictly before us. But, assuming the one pleaded was admitted in evidence, we think the court's conclusions on the evidence certified to, were correct.

The other errors assigned relate to the admission and exclusion of evidence. But the so-called statement of facts and evidence contain nothing upon which they can be predicated. It does not appear therefrom what evidence, if any, was excluded, or what evidence, ~~xxxxxxx~~ admitted was objected to, if any.

The judgment is affirmed.

AFFIRMED.

IN SENATE
JANUARY 18, 1881
COMMITTEE ON JUDICIARY

1881 A. 375

THE JUDICIAL SYSTEM OF THE UNITED STATES

But in the court below was thought to be necessary
to itself of certain evidence which it might be
possible to obtain by virtue of a contract, the substance of which was
given to be set forth therein. The principal then assigned
is that contrary to the law and evidence the court found the
plaintiff was not a partner under said contract. The so-called
statement of facts, which is contained in an amended affidavit
is regarding all the evidence, does not contain said contract,
and therefore the question is not strictly before us. But,
assuming for one moment we admitted in evidence, we think the
court's conclusions on the evidence admitted to, were correct.
The other entire assigned relates to the admission
and exclusion of evidence. But the so-called statement of facts
and evidence contains nothing upon which they can be predicated.
It does not repeat the evidence which evidence, if any, was admitted,
or what evidence, if any, was excluded, or what evidence, if any,
The judgment is affirmed.

RECORDED

43-18474

HEFTO SWEFTO,
Defendant in Error
vs.
TONY VASIL, STEVE SERBINOFF
and GEORGE NICHOLA,
Plaintiffs in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

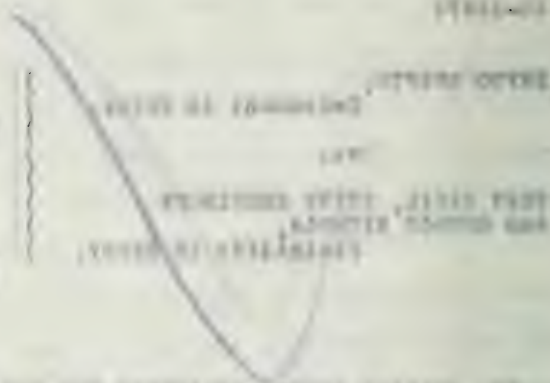
182 I.A. 376

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The state of the record and questions raised in this case are the same as in Case No. 18473, in which our opinion has this day been filed, and for the same reasons therein stated the judgment will be affirmed.

AFFIRMED.

1851 A. 878



THE EXHIBIT BEING RECEIVED THE DECISION OF THE COURT.

THE EXHIBIT OF THE COURT HAS BEEN RECEIVED AND IS
HEREBY RETURNED TO THE COURT IN CASE NO. 1851, IN WHICH THE COURT
HAS THIS DAY MADE THE DECISION, AND THE COURT HAS BEEN ADVISED
THE EXHIBIT WILL BE RETURNED.

ATTEST.

37-18498

GEORGE W. WATTS,
Defendant in Error,

vs.

FRANK O. BALCH,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

182 I.A. 377

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for a balance claimed to be due upon a contract attached to and made a part of his statement of claim, alleging that defendant had failed and neglected to carry out the same to his damage, etc.

The contract recited that the plaintiff is the owner of a certificate of twenty shares of capital stock of a certain company, and of its promissory note for \$1000, and that the defendant agrees to purchase said note and stock of plaintiff for a certain sum on or before a future date, and that upon payment of such sum plaintiff agrees to sell and transfer to defendant all his interest in and to said note and stock.

One of the defenses to the claim set up in the affidavit of merits was that "the covenants of the contract sued on as to payment and delivery are mutual and dependent, and that no tender of said note and stock or release has ever been made by plaintiff to defendant."

There was no averment in the statement of claim of any tender of said stock and note, or of anything which excused a tender. This was essential to the statement of a legal cause of action for breach of said contract. But the court refused to strike plaintiff's statement of claim from the files and granted his motion to strike the affidavit of merits from the files, and thereupon assessed damages to the amount claimed and entered judg-

STEWART M. WATTS,
Defendant in Error,
vs.
FRANK J. BAIRD,
Plaintiff in Error.

ORDER TO RETURN

IN THE COURT OF COMMON PLEAS

1821.A.377

THE HONORABLE JUDGE OF THE COURT.

Plaintiff moved for a writ of habeas corpus to set aside and annul a judgment rendered by the Court in the above entitled case, and made a part of his statement of claim, alleging that defendant had failed and neglected to comply with the order of the Court, to-wit:

The Court ordered that the plaintiff in the above case, at a distance of twenty miles of capital stock, of a certain company, and of the company's note for \$100,000, and that the defendant agree to purchase said note and stock of plaintiff for a certain sum on or before a future date, and that upon payment of said sum plaintiff agree to sell and transfer to defendant all his interest in and to said note and stock.

One of the defenses to the claim set up in the affidavit of service was that "the covenant of the contract made on or before payment and delivery was not made and payment, and that no transfer of said note and stock or interest has yet been made by plaintiff to defendant."

There was no evidence in the statement of claim of any transfer of said stock and note, or of anything which excused a transfer. This was essential to the statement of a legal cause of action for breach of said contract. But the Court refused to strike plaintiff's statement of claim from the files and granted his action to strike the affidavit of service from the files, and thereupon assessed damages to the amount claimed and entered judgment.

ment as in case of default.

The defense was a legal one. It is plain that the agreements to pay the money and transfer and deliver the stock and note were mutual and dependent. Neither party, without tender of performance, could demand performance of the other. The law on this subject is settled. (Henderson v. Wheaton, 40 Ill. App. 532, affirmed in 139 Ill. 581; Burnham v. Roberts, 70 Ill. 19; Lester v. Jewett, 11 N. Y. 453; Manistee Lumber Co. v. Union Nat. Bank, 143 Ill. 490; Bank of Columbia v. Wagner, 1 Peters 485; Delaware Trust Co. v. Calm, 195 N. Y. 331; Cornett v. Best, 122 S. W. Rep. 35.)

While under a proper statement of claim the burden of proof would have been on plaintiff to show tender or facts excusing the same, defendant had a right to set up and prove the contrary in view of the denial of his motion and the rule on him to file an affidavit of merits.

For the error in striking the latter from the files, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

which is in issue in the case.

The defense was a legal one. It is plain that the

agreement to pay the money and transfer and deliver the stock
and note was mutual and dependent. Neither party, without consent

of the other, could obtain possession of the other. The law

is well settled in this regard. (Henderson v. Threlton, 10 Ill. App.

111, affirmed in 120 Ill. App. 111; between V. Bessie, 10 Ill. App.

111, affirmed in 120 Ill. App. 111; V. Bessie, 10 Ill. App. 111.

See, also, 111 Ill. App. 111; Bank of Columbia v. Bessie, 111 Ill. App.

111, affirmed in 120 Ill. App. 111; Cornett v. Bessie, 111 Ill. App.

111, affirmed in 120 Ill. App. 111.

While there is a proper statement of the facts of

the case, it has been on plaintiff's side to show that the facts are

such as to show that defendant had a right to set up and prove the

defense in view of the facts of the case and the rule on this

is well settled in this regard.

For the same reason the latter law is also

the law of the case and the facts of the case are

reversed and affirmed.

353 - 17889

1821.A.378

MARY ROGOWSKI,
Appellee,

vs.

JOSEPH PICHA, Sr., and
JOSEPH PICHA, Jr.,
Appellants.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

This is a suit brought by the appellee, as plaintiff, for damages on account of personal injuries alleged to have been received by her while a tenant of the defendants, by reason of their alleged negligence in permitting a sidewalk to become in bad condition. The suit was originally brought against William Picha and Joseph Picha, Jr., his brother, and Frank Krec, a brother in law. Subsequently it was dismissed against Frank Krec, who had died, and Joseph Picha, Sr., father of William Picha and Joseph Picha, Jr., was made an additional party defendant. On the day of the trial it was dismissed as against William Picha, and a verdict rendered by a jury in favor of the plaintiff against Joseph Picha, Sr., and Joseph Picha, Jr., as joint defendants, upon which judgment was rendered.

A plea of general issue was filed by the defendants, and also a special plea denying ownership of the premises in question, and also denying possession and control of the building by any one or all of the defendants.

The decision of the case rests upon the question as to ownership and possession.

The only testimony on behalf of the plaintiff seems to have been her own, so far as this question is concerned. The tea-

1821-4-378

APPEAL FROM CIRCUIT COURT, YORK COUNTY.

WILLIAM WOODWARD,
Plaintiff,
vs.
JOSEPH PITCH, Jr., and
JOSEPH PITCH, Sr.,
Defendants.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

This is a bill brought by the plaintiff, as stated, for damages on account of personal injuries alleged to have been received by her while a tenant of the defendant, by reason of their alleged negligence in permitting a sidewalk to become in bad condition. The suit was originally brought against William Pitch and Joseph Pitch, Jr., his brother, and Thomas Hyes, a partner in law. Subsequently it was dismissed against Thomas Hyes, who had died, and Joseph Pitch, Sr., father of William Pitch and Joseph Pitch, Jr., was made an additional party defendant. On the day of the trial it was decided to admit William Pitch, and a verdict rendered by a jury in favor of the plaintiff against Joseph Pitch, Sr., and Joseph Pitch, Jr., on joint behalf. After which judgment was rendered.

A plea of general issue was filed by the defendants, and also a special plea denying ownership of the premises in question, and also denying possession and control of the building by any one or all of the defendants.

The decision of the case rests upon the question as to ownership and possession.

The only testimony on behalf of the plaintiff seems to have been her own, so far as this question is concerned. The tes-

tified that she knew Joseph Picha, Sr., Joseph Picha, Jr., and "William Picha, Jr."; that Mrs. Picha collected the rent; that Picha, Sr., received the last rent from her; that she always paid the rent to the "old Pichas"; that when anything got out of order, Joseph Picha, the elder, fixed it, and that she had heard him talking about selling the property. There was further testimony tending to show that Joseph Picha, Sr., and his two sons, Joseph, Jr., and William had been seen around the premises repairing the sidewalk, and that of another witness that Joseph Picha, Sr., and Joseph, Jr., also had been around "fixing up the sidewalk."

The accident is alleged to have occurred on August 14, 1908. The following facts were agreed upon, but their admission in evidence objected to by defendants as irrelevant: that Joseph Picha, Sr., and his wife gave a warranty deed to the premises to William Picha December 27, 1905, which was recorded the same day; that William Picha made a deed to Frank Krec May 12, 1909, recorded May 13, 1909, consideration \$8,000; that Krec and wife gave a quit-claim deed of the property to Joseph Picha, Jr., November 2, 1909, and that this deed was recorded November 22, 1909, and bore the same consideration.

Over objection, the defendant Joseph Picha, Sr., testified on cross-examination that after one Juliana Saminski had been hurt, or claimed to be hurt, he transferred his property to his son, William Picha, who lived in the house with him; that the said William was then 20 or 21 years old; that Frank Krec, to whom William Picha made the deed May 12, 1909, died about two years before the trial; that when he was about to die he and his wife conveyed the property to Joseph Picha, Jr., who then transferred it to Krec's wife. It further appears, as above set forth, that the last transaction was nearly three years after the date of this accident.

After all the testimony had been introduced, a motion was made by the defendants that a verdict be directed in their favor because there was no evidence that defendants were the

joint owners of the property, or that either of them had title at the time of the happening of the accident, or that they were in possession jointly or otherwise of the property, or in such a manner as to render them liable, jointly or severally, for the accident in question.

We think this motion should have been granted and a verdict directed. Neither at the close of the plaintiff's case nor after the evidence of the defendants had been received, was there proof of such a character as would have rendered the defendants jointly (or severally) liable. The legal title to the property was in Frank Krec, and this was evidently known to the plaintiff, because Krec was joined originally as a defendant. Both Joseph Picha, Sr., and his wife testified that they collected the rents as agent for Krec. The mere collecting of rent by Picha would not of course render him liable as owner, much less would it establish liability of his son and himself as joint owners or as joint possessors.

The judgment must be reversed.

REVERSED.

total owners of the property, or that either of them had title at the time of the happening of the accident, or that they were in possession jointly or otherwise of the property, or in such a position as to render them liable, jointly or severally, for the accident in question.

We think this motion should have been granted and a verdict directed. Neither at the close of the plaintiff's case nor after the evidence of the defendants had been received, was there proof of such a character as would have rendered the defendants jointly or severally liable. The legal title to the property was in Frank Kroc, and this was evidently known to the defendant, because Kroc was joined originally as a defendant. Both Joseph Kroc, Jr., and his wife testified that they collected the rent in a hall for Kroc. The mere collecting of rent by them would not in itself render him liable as owner, much less would it establish liability of his son and himself as joint owners or as joint tenants.

THE JUDGMENT MUST BE REVERSED.

REVEREND.

172-17308

182 I.A. 379

GEORGE A. BERGTOLD,
Appellee,
vs.
SIDNEY W. WORTHY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

An admitted fact in this case is that the appellee paid the appellant prior to the beginning of this suit, \$3,554.24, for which amount the suit was brought, upon a contract made orally, whereby the former was to obtain from the latter the whole or a part of the interest which the latter had in lands in Colorado, or in contracts for the purchase of such lands. The parties do not agree as to the terms of this contract, and as the court directed a verdict in favor of the appellee we base our decision entirely (as it is to be supposed the Municipal Court did) upon the testimony of the appellant.

It is to be noted that appellant admits he received the sum in question, and he further admits that he disposed of his interest in the contracts hereinafter mentioned, to someone other than appellee, and thus put it out of his power to carry out his contract with the appellee. It is further to be observed that he insists that he gave the appellee notice that he proposed to make such sale.

Counsel for appellant in the printed argument makes a recital of what he claims to have been appellant's testimony. This recital is not in entire accord with the record, but is to the following effect: Appellee bought appellant's interest in

1821 A. 358

ARRIVAL FROM MINISTERS

CHIEF OF CHIEFS

CHIEF OF CHIEFS

CHIEF OF CHIEFS

CHIEF OF CHIEFS

It is admitted that in this case is that the appellee
has the precedent prior to the beginning of this suit, 1821 A. 358.
The other account the suit was brought, upon a contract made orally,
whereby the forest was to be sold to the appellee, the whole of it,
and at the instant which the latter had in hand in Colorado, or
in the purchase of such forest. The parties do not
know as to the facts of this contract, and as the court directed
remanded in favor of the appellee we have not reached finally
the point as to be opposed the appellee (Court 1821) upon the testimony
of the appellee.

It is to be noted that appellee admits he received
the sum in question, and he further admits that he received of
his interest in the contract hereafter mentioned, in some way
when then appellee, and thus put it out of his power to carry
out the contract with the appellee. It is further to be observed
that he admits that he gave the appellee notice that he proposed
to make such sale.

Conceding for argument in the printed argument which a
recital of what he claims to have been appellee's testimony.
This recital is not in entire accord with the record, but is to
the following effect: Appellee bought appellee's interest in

the latter's contracts with the Union Pacific Land Company for the purchase of 15,000 acres of Colorado land, which contracts appellee agreed to assume; that appellant had paid on said contracts \$8,800, and that the difference between what the appellant had paid for the land and \$2.50 per acre amounted to \$8,600, making a total of about \$17,000; that appellee was to assume appellant's contracts with the Union Pacific Land Company; that the sum of \$8,800, the amount which appellant had invested in the land, was to be paid at once, and that appellee at that time was to take over the Union Pacific Land Company contracts; that from September 5, 1907, to May 25, 1909, appellant, as frequently as three or four times a week, spoke to appellee about the performance of the contract, and received each time a definite promise of payment at some specified time; that before the appellant "resold the land he repeatedly notified the plaintiff that he would resell it"; that the appellant "resold the land to Porter Thompson for \$2.00 per acre, which was a fair and reasonable price for land of that quality and location." It is further stated in the argument that appellants testimony shows that the appellee had notice before making the contract that the principal reason why appellant sold the land was to get rid of the carrying charges, consisting of taxes and interest which the appellant had to pay to the Union Pacific Land Company, or forfeit the land and all previous payments; that after the contract was made, and while appellee was in default, appellant repeatedly notified appellee that appellant was paying these taxes and interest in order to hold the land for appellee, and that appellant notified appellee that unless appellee performed his contract appellant would sell the land in order to get rid of said taxes and interest; that the appellee knew how the appellant held the land, and knew the terms of the contracts by which appellant held it, and knew that unless the taxes and interest were paid the land and all previous payments would be forfeited.

The contracts between appellant and the Land Company

[illegible]

were not offered in evidence, and while the appellant testified that he sold the land on the 25th day of May, 1908, to Porter Thompson, there was no evidence that he ever had title to the land, and it may be presumed that what he meant to say was that he assigned the contracts with the Land Company. While the assertion is made by counsel that the appellant testified that appellee knew how appellant held the land and the terms of the contracts by which he held it, etc., the record does not quite bear out this statement. At the close of his cross-examination, the appellant testified that he did not recollect having shown appellee his contract with the Land Company, but that he had shown him some of the contracts; that he may not have shown him "that particular contract," and that he did not remember that he had testified to that effect the day before. He further testified that he told Bergtold and Nye, in the latter's office, that he thought he would sell the land; that he did not say he would sell it but that "I think I will sell it"; that upon this Bergtold made no comment but Nye said, "When do we get our money?" and the appellant said he thought he could fix that up; that he had reference to the entire tract and that appellee demanded this \$3,500 of him a number of times.

We have refrained from giving the testimony of the appellee as to his version of the contract, but assuming the testimony given by the appellant correctly recited the terms of this agreement, we are of the opinion that the appellant has not shown a right to forfeit the contract. On the other hand, by his admitted acts, he had put it out of his power to fulfill the contract on his part, and therefore the contract may be said to have been rescinded by mutual consent, the appellee having elected so to treat it, as he had the right to do. The law is too well established to require the citation of authorities in support of the proposition that where a contract like the one in question has been rescinded by mutual consent, in the manner indicated, the vendee is entitled to recover from the vendor moneys paid upon it. The

was not offered in evidence, and while the witness testified
that he sold the land on the 15th day of May, 1907, to the
Hempstead, and was not aware that he ever had title to the land,
and it may be presumed that what he meant to say was that he
signed the certificate with the Land Company. While the question
he asked of counsel that the witness testified that he sold the
land to the Hempstead, the land was the land of the Hempstead by
which he said it, etc., the record does not reflect that this
statement. At the close of his cross-examination, the witness
testified that he did not recollect having shown anyone his name
with the Land Company, but that he had shown his name of the
Hempstead, that he may not have shown his "Hempstead" com-
pany, that he did not remember that he had testified to that
effect at any time, he testified that he had testified
and that, in the witness's office, that in 1907 he sold the
land, that he did not say he would sell it but that "I think I
will sell it"; that upon this Hempstead was no company but the
Hempstead, "that he got out money" and the witness said he thought
he would say that he had had reference to the same land and
that witness denied this \$5,000 of his a number of times.
The witness then giving the testimony of the
witness as to his version of the contract, and assuming the
view of the witness that the witness had not shown
anyone, as to the opinion that the witness had not shown
a right to forfeit the contract. On the other hand, by his testimony
that he had put it out to his agent to collect the contract on
his part, and therefore the contract may be said to have been for-
feited by mutual consent, the question being asked as to that
it, and he had the right to do so. The law is well established
to require the election of authorities in support of the pro-
position that there is a contract like the one in question has been
rescinded by mutual consent, in the instant instance, the vendor
is entitled to recover from the vendor money paid upon it. The

trial court did not err in instructing a verdict for the plaintiff (appellee), and the judgment is affirmed.

AFFIRMED.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

380-17917

HAYES PUMP and PLANTER COMPANY,
a corporation,

Appellee,

vs.

THE ASSURANCE COMPANY OF AMERICA,
Appellant.

182 I.A. 380

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

(Action by
Assurance Co. vs. Hayes et al.)
Suit was brought by the plaintiff (appellee) against the defendant (appellant) for \$4,251.78, with interest, on account of a loss by fire in Kansas City, Missouri, October 12, 1909. The basis of the claim, as appears from the statement of claim, is that there was an adjustment between the parties at this amount, and suit was brought not upon the policy itself but upon the implied promise to pay, created, if at all, by the alleged settlement. The affidavit of defense denies in form the promise to pay, and sets out that the liability of the defendant, if any, is for the sum of \$2,763.65.

Under the policy in question the insurer undertook to insure, in an amount not exceeding \$15,000, the insured stock of agricultural implements, etc., located at any place within the limits of the United States, except in plants where goods were manufactured by the insured.

The policy contains these provisions:

"This company shall not be liable for more than \$5,000 in any one loss.

"In consideration of the reduced rate at which this policy is written, it is expressly stipulated and made a condition of this contract, that this company shall be liable for no greater proportion of any loss or damage than the amount hereby insured bears to ninety per cent. (90%) of the actual cash value of the property described herein at the time when such loss or damage shall occur, nor for more than the proportion which this policy bears to the total insurance thereon."

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage oc-

1881.A.880

APPROVAL FROM BOARD OF DIRECTORS
DATE OF APPROVAL

THE BOARD OF DIRECTORS OF THE
COMPANY HAS REVIEWED AND APPROVED
THE FOLLOWING RESOLUTIONS
PASSED AT A MEETING OF THE BOARD
HELD AT THE CITY OF NEW YORK
ON THE 15TH DAY OF JANUARY 1901

RESOLVED, THAT THE BOARD OF DIRECTORS OF THE COMPANY DO HEREBY

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cure, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy.

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto."

There is a further provision that no action shall be sustainable upon the policy unless brought within 12 years next after the fire.

The insured had in addition to this policy one with the London Lloyds, covering the same property to the extent of \$15,000, and under which the liability was limited to \$1,500 in any one fire.

The defendant employed the Western Adjustment and Inspection Company of Chicago to look after its interests in the adjustment of the loss. It is the contention of the defendant that this is an independent adjusting concern; that its business is to ascertain and set forth in the form of an affidavit, commonly called a proof of loss, the facts in regard to the origin of the fire, the ownership or interest of the assured in the property injured or destroyed, the amount of the loss, and the proportion thereof chargeable to each policy, when there is more than one policy involved; but that it has no authority to make contracts or pay losses or pass upon the legal liability of the companies.

The case was tried before the court without a jury, and upon a finding made judgment was entered for the full amount

claimed by the plaintiff.

To the proofs of loss submitted by the plaintiff to the defendant, the following schedule was attached:

"SCHEDULE - STATEMENT OF LOSS.

Statement of Loss

Hayes Pump & Planter Co. Kansas City, Mo.

Fire-October 12th, 1909.

Value at Kansas City based on assured's records verified

| | |
|---|------------------|
| by adjuster . . . | \$7395.35 |
| Less value of salvage as agreed in detail . . . | 1213.68 |
| Loss . . . | <u>\$6181.67</u> |

Sound value at all points

as determined by adjuster based on assured's records. \$37279.69
Insurance required under 90% co-insurance clause . \$33551.72

| | |
|--------------------------------------|------------------|
| Companies insure \$30,000.00 and pay | \$5527.29 |
| Assured co-insures 3,551.72 and pay | 654.40 |
| | <u>\$6181.69</u> |

Details on file in office of Western Adjustment & Inspection Co., Chicago, Illinois.

Western Adjustment & Inspection Company
C. L. Whittemore,
Adjuster.

SCHEDULE OF INSURANCE AND APPORTIONMENT OF CLAIM.

| Pol.No. | Expiration | Name of Co. | Amt. of | | Claim. |
|---------|------------|--------------------------|----------|---------|-----------|
| | | | policy | Insured | |
| 426292 | 11-23-09 | Assurance Co. of Am.N.Y. | \$15000. | \$5000. | \$4251.75 |
| 17360 | 4-16-10 | *Lloyds Eng. | 15000. | 1500. | 1275.53 |
| | | Totals - - | \$30000. | 6500 | 5527.29 |

*This policy covers identical property insured by Assurance Company, but its liability is limited to \$1500.00 in any one loss."

The proofs of loss were submitted to the defendant within the sixty days required by the policy, and were retained by the defendant until after three months had expired, when correspondence ensued between the parties. In this correspondence there is claimed by the defendant that a mistake was made by the adjuster in the division of the loss between the Lloyds Company and the defendant, and that the amount chargeable to the defendant was erroneously placed at the figures set forth, because of the

obtained by the following:

In the event of loss, the following amounts are payable:

the following amounts are payable:

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co-insurance clause in the policy, to which reference has heretofore been made, and it was asserted that under the law the proportion of the loss to be charged to the defendant was properly \$2,763.68, as was asserted by the defendant in its affidavit of defense, to which allusion has been made.

After careful consideration of the case we are of the opinion that the contention of the defendant in this respect is sustained by the proof.

The contentions of the defendant then are: first, that the Municipal Court was without jurisdiction; second, that there was no new covenant, express or implied, to pay any sum on account of the loss and damage; third, that the claim is barred by the policy limitation of one year; and fourth, that the finding and judgment are excessive.

The primary purpose of the adjustment by the Adjustment Company employed for that purpose evidently was to fix the total amount of the loss. The division between the two insurance companies was a mere matter of calculation, and the amount to be paid by each was easily computable after the total amount of loss had been fixed by the adjuster. The question as to the effect of the co-insurance clause in the policy has not been discussed by the plaintiff in its brief, and, as heretofore stated, we are of the opinion that the contention of the defendant in respect to it is sustained. It would appear from the record that no tender was made by the defendant of the amount which it admitted was owing the plaintiff, but that on the other hand after holding the proofs of loss for ninety days it offered to pay the amount upon new proofs of loss being furnished. No change was required in respect to the essential features of the proofs of loss, having regard to what caused the fire, the amount of the total loss, etc., but merely a change of the figures in the percentage of the total loss which the defendant would be called upon to pay and which the defendant admitted it should pay.

no business done in the city, in which business was done
before that date, and it was determined that the business was
limited of the fact to be changed to the business was
\$5,000.00, as was determined by the business in the city of
Gaines, in which business was done.

After careful consideration by the city we are of the
opinion that the construction of the bridge in this respect is
contained in the record.

The construction of the bridge was done in
that the Municipal Council was without jurisdiction; second, that there
was no agreement, express or implied, to pay any sum on ac-
count of the fact that the city is bound to
the policy limitation of the city and county, that the time
for and payment are excessive.

The primary purpose of the adjustment by the city
[Gaines] Company, which was made in the city of Gaines, was to the
the total amount of the loss. The business was done in the
insurance companies and a very large amount of business, and the
amount to be paid by each was greatly multiplied after the total
amount of loss had been fixed by the company. The question
as to the effect of the adjustment made by the policy in
not been discussed by the plaintiff in its brief, and, as before
stated, we are of the opinion that the construction of the
defendant in respect to it is mistaken. It would appear that
the policy that no longer was made by the plaintiff in the amount
which it admitted was owing the plaintiff, and that on the other
hand after having the amount of loss for ninety days it refused
to pay the amount now made of loss and interest. No
change was required in respect to the financial position of the
policy of loss, having regard to what amount the loss, the amount
of the total loss, etc., but merely a change of the figure in
the percentage of the total loss which the defendant would be
called upon to pay and which the defendant admitted at about 10%.

It is the clearly established law that when an adjustment is fully completed in a case like the present, and fully agreed to by both parties, a new contract arises to pay the amount agreed upon as a result of the adjustment. *Illinois Mutual Fire Ins. Co. v. Archdeacon et al.*, 88 Ill. 238; *Home Insurance & Banking Co. of Texas v. Myer*, 93 Ill. 271.

The defendant in the brief says: "If any promise to pay could be implied from the mere fact of the adjustment in this case (which, however, we deny), it could at the very most be no more than an implied promise to pay proper sum justly apportionable to appellant's policy according to its terms and conditions, namely, \$2,763.65. The finding and judgment, if any, therefore, should not have been for more than said sum of \$2,763.65 and interest, and the finding and judgment, therefore, are excessive."

It is admitted by the defendant that the total amount of the loss was properly ascertained and fixed by its own adjuster, and that the proofs of loss were prepared by its adjuster and executed by the plaintiff, and that the only error in the proofs was caused by a misconception of its adjuster and the insured as to the apportionable part to be paid by the defendant.

We are of the opinion that an implied promise to pay the proper sum justly apportionable to the appellant's policy arose. This sum fell due under the terms of the policy on December 12, 1910. The judgment was rendered August 24, 1911. In our opinion the judgment should have been for \$2,998.55. If plaintiff within ten days from the date of the filing of this opinion shall enter a remittitur of \$1,542.64 the judgment of the Municipal Court will be affirmed for ^{the} reduced amount; otherwise the judgment will be reversed and the cause remanded for further proceedings in conformity herewith. The costs of this court will be equally divided between the parties.

AFFIRMED ON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

[illegible]

The following is the text of the letter to the President of the United States, dated January 1, 1941, from the American Friends of the British Commonwealth:

[illegible]

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED

October 1, 1912, No.

18-12385

182 I.A. 387

J. W. GOGGIN,

Defendant in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,

Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

A telegram was delivered to the defendant by the plaintiff at Mt. Horeb, Wisconsin, on March 8, 1911, addressed to a Dr. Patten at Chicago, and reading: "Forward my mail including tomorrow's mail. J. W. Goggin." The message as delivered to Dr. Patten was headed "Milwaukee, Wis." instead of "Mt. Horeb, Wis." Damages alleged to have been caused by this mistake are claimed.

By a stipulation of facts entered into before the trial judge it would appear that the plaintiff had entered into a contract with one Golden, under which the latter was to audit certain books at Lumberton, New Mexico; that under the contract Golden was to write plaintiff before his departure from Colorado Springs to ascertain if anything had developed which would make the trip unnecessary. The stipulation of facts which appears to have been entered into by the parties, part of which is abstracted, and to a part of which our attention has been called by an additional abstract, contains the following:

"That shortly before March 8, 1911, Dr. Goggin (plaintiff) had received word from Lumberton, New Mexico, that it was not necessary to send the auditor there, and that Dr. Goggin was waiting to hear from Golden to ascertain his whereabouts, so that he could so inform him.

"That had the telegram originally sent on March 8, 1911, from Mt. Horeb been correctly transmitted Dr. Goggin would have received the Golden letter in time to prevent Golden's leaving for Lumberton, and had Golden received word before his departure Goggin would not have been liable for any expenses.

"That by reason of the error in transmitting the telegram, Dr. Goggin was forced to pay Golden's expenses and sal-

ary incurred by reason of his trip to Lumberton, which amounted to Ninety-two Dollars and ten cents (\$92.10) in compliance with the terms of the contract between Goggin and Golden heretofore referred to."

This would seem to be in form a practical admission by the defendant of the amount of damages to which the plaintiff was entitled.

The case was tried before the court and judgment was rendered for plaintiff on a finding.

No question of law appears to be raised in the record. No objection was made to the introduction in evidence of the "stipulation of facts", for obvious reasons. Section 81 of the Practice act, chapter 110, ^{J. & G. 91544} (as to tendering propositions of law to be passed upon, has been made effective in the Municipal Court by rule 21 adopted by that court.

In the case of Merrimac Paper Co. v. Illinois Trust & Savings Bank, 129 Ill. 296, it was said:

"No propositions of law were asked upon either side to be held by the trial court, and, in accordance with the uniform holding of this court, we must again hold that no questions of law are raised by this record which we can review. If the plaintiff below desired to preserve the rulings of the court in its application of the law to the facts of the case, formal propositions of law should have been prepared and submitted, and the rulings of the court thereon, if adverse to the view of the plaintiff, could have been excepted to, and such exception preserved. This was not done, and the principal question sought to be raised by counsel is not therefore before us,"

thus following First National Bank of Michigan City v. Haskell, 124 Ill. 587, and Northwestern Benevolent and Mutual Aid Assn. v. Hall, 118 Ill. 169.

The judgment will be affirmed.

AFFIRMED.

any insurance by reason of his title in Huntington, which was not
of to ninety-two Polaris and ten acres (500.1) in Huntington
with the terms of the contract between Gorman and John Gorman
before referred to."

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...and shall be deemed to have been made by the insured at the time of the accident.

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17. *Open and closed before the vowel*

...and the ...

As a condition of its release to the public, this document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

The following are some of the information in reference to the "1955-56" year:

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-14-2010 BY 60322 UCBAW

Page 10 of 10

1. The first of these is the fact that the

recovered in the amount of

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DATE MAY 11, 1968, 117 DMC, 1000 HRS

[illegible]

THE UNIVERSITY OF CHICAGO

FORM 1041-10-73 (Rev. 10-1-73)

[illegible]

...the ... of the ...

.....

275 - 18418

275 - 18418

ELL F. HART,
vs. Appellee,

JOHN C. SCHULTZ, et al.,
on appeal of
John C. Schultz,
Appellant.

APPEAL FROM CIRCUIT

COURT, JOSEF COUNTY.

ELL F. HART,
vs. Appellee,

JOHN C. SCHULTZ, et al.,
on appeal of
Carrie P. Schultz,
Appellant.

182 I.A. 388

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

In these cases separate appeals have been taken from a decree entered in favor of the appellee, Hart, as complainant, in a suit brought by him against the appellants (defendants), John C. and Carrie P. Schultz.

By the decree, after the recital of many findings, which will hereinafter be referred to, it is decreed that there was due on November 21, 1911, to the complainant from the defendants upon an accounting the sum of \$68,197.43, which sum as there is a first and prior lien upon certain lots mentioned, in the city of Chicago, subject to a certain trust deed given to the defendants for the sum of \$1,000, and in certain party-wall agreements, that the legal title to said lots is in the complainant as part security for the amount so found due, subject to the liens and agreements. The decree provides, substantially in the form of a decree in proceedings, that unless the defendants pay the amount so found due with interest, within 30 days,

premises be sold; that the master out of the proceeds of the sale retain his fees, disbursements, etc., and pay to the officers of court one-half their costs, and out of the remainder pay to the complainant the amount as found due with interest, that if said remainder shall not be sufficient to pay said amount with interest, that he apply in to the court when in any manner is satisfaction thereof, etc.; that if the remainder shall be more than sufficient to shall hold the surplus subject to the order of court. Then follows the usual order respecting the issuance of a master's deed of conveyance, etc., if the premises shall not be redeemed from sale within fifteen months after the date of the sale, etc. The decree by the court further orders that the bill and assessments thereto be dismissed as to John and William Finckh, who had been made parties thereto, and also as to certain premises described other than the ones ordered to be sold. There is a further provision in the decree that from the 21st day of November, 1903, and until the termination of the period of redemption, the complainant shall collect the rents and profits of the premises ordered to be sold, and account to the court for the same, without prejudice to the rights of either of the parties to apply for a receiver within said period.

The exceptions of the complainant which had to do with the findings of the master with respect to the property not ordered to be sold, and the alleged error against the defendant's financial state, were overruled.

The findings of fact in the decree, which are in most respects identical with the findings of the master in his report, are to the effect that early in July, 1906, the complainant was looking for a desirable investment, and was introduced to the defendants, John C. Schultz and Carrie P. Schultz, his wife; that the defendant husband was introduced to Hart as a real estate man, well informed as to properties and the values thereof in the locality

adjacent to 63rd street and Ashland avenue, in the city of Chicago; that the defendants, husband and wife, were at that time carrying on a business as real estate brokers and were engaged in buying and selling real estate, renting and collecting rents, etc.; that at the time of the introduction of the defendant John C. Schultz to Hart a number of pieces of property in the vicinity mentioned, and gave it as his opinion that they were very desirable investments; that the said defendant gained the confidence of the complainant to a very great degree, and that the complainant appears to have placed implicit confidence in the said defendant and relied almost entirely on representations and statements made by him in the dealings which were had between them; that in a number of the transactions herein mentioned, consisting of the purchase of lots by Hart through John C. Schultz, the latter represented the lots in question as being worth considerably more than their real market value, and gave to Hart prices at which the said lots could be purchased, which were much in excess of the actual prices placed upon them by their owner, but represented to Hart that the prices named were very reasonable; that as a result of the representations Hart agreed to buy a number of different lots at prices considerably above their actual value, some of which lots were owned by the defendant John C. Schultz, or the other defendant, his wife, or both of them, at the time, or had under contract, and some of which the defendant John C. Schultz knew were for sale at a much lower figure than that given to Hart; that when the different deals were closed the defendant John C. Schultz, acting for the partnership of John C. Schultz & Co., and also as the agent of said Hart, attended to all of the details, received from Hart the amount at which Hart had agreed to purchase, and paid to the owner the same they were willing to receive for the same, and retained the balance for his own benefit or for the benefit of his said firm; that the defendants, as John C. Schultz & Co., had their office in the

Building on the southwest corner of Ashland Avenue and 63rd Street, which building was called the "Schultz Building", and known as 2800 Ashland Avenue, situated upon lots 1 to 5 in block one (1) in Daniel Park subdivision, and hereinafter spoken of as "parcel No. 1"; that by deed dated April 9, 1907, one Frederick Kaldenbeck conveyed the same by quit-claim deed to the defendant Carrie F. Schultz, and by quit-claim deed dated on the following day the defendant husband conveyed his interest in the defendant his wife, his wife joining in the deed, the deed reciting that she joined in the conveyance for the purpose of releasing any and all right of dower and homestead, viz.: that the real ownership of said parcel at the time of the transaction was in one or other, or both, of the defendants, that the defendants had been married but a short time, and had been engaged in the real estate business, the defendant husband attending to the outside work, and the defendant wife chiefly to the inside or office work; that the defendant wife, with reference to a large number of the transactions herein referred to, relied upon the defendant her husband, and to a great extent did what she was directed by him to do until within a short time of the filing of the bill herein, when she became suspicious of him with reference to some of their financial transactions and interests, that their relations thereafter became strained and they were unable to get along together amicably, either in their relations as husband and wife or in their business relations; that on or in the month of July, 1906, as the result of the conversation between the complainant and the defendant John C. Schultz, complainant agreed to purchase, and on the 22nd day of August, 1906, became the owner of lots 14 to 17, both inclusive, in block 4 in Daniel Kaldenbeck's subdivision, and on the 10th day of July, 1906, he agreed to purchase and become the owner of lots 14 to 17 in said block 4, that prior to entering into the agreement hereinafter mentioned the title to parcel 1 was in the name of the defendant her husband and

Whereas, it has also been agreed between all the parties hereto that the total and entire cost of the erection and completion of said buildings shall be paid as follows, to-wit: eight-thirtieths (8/30ths) of the same by said Mrs. Scholtz and five-thirtieths (5/30ths) of the same by said Mrs. Scholtz, now the said Hart agree that upon the payment of him by said Mrs. Scholtz of five-thirtieths (5/30ths) of all moneys which have been furnished by him to erect the foundation and walls of said building and place the same under roof, and also, in addition thereto, the sum of thirty-two hundred and fifty dollars (\$3,250) (said sum of thirty-two hundred and fifty dollars (\$3,250), together with two hundred and fifty dollars (\$250) already paid, being the amount returned the said Mrs. Scholtz and said Hart for the same price of said lot 1A), all to be paid within thirty days of the time when such roof is completed, the said Hart

The first part of the report is devoted to a general survey of the situation in the country. It is followed by a detailed account of the work done during the year. The report then goes on to discuss the various projects which have been undertaken, and the progress which has been made in each of them. The final part of the report is devoted to a summary of the results of the work, and to some suggestions for the future.

The second part of the report is devoted to a detailed account of the work done during the year. It is divided into several sections, each dealing with a different aspect of the work. The first section is devoted to a general survey of the situation in the country. It is followed by a detailed account of the work done during the year. The report then goes on to discuss the various projects which have been undertaken, and the progress which has been made in each of them. The final part of the report is devoted to a summary of the results of the work, and to some suggestions for the future.

to said Mrs. Schultz said lot 14 and also will have to pay said lot 14, which said lot 14 from said part to be as drawn as to provide as long as the building shall remain and be occupied for stores and apartments, as now constructed, for the joint use of the halls and passageways and stairs and stairways therein which are located on lots 14 and 15, it being the intention of all the parties hereto that said halls shall be for the free and common use of all said parties hereto, their heirs, executors, administrators, assigns, tenants, and all parties holding or occupying said premises under them or either of them.

It is further agreed between all the parties aforesaid that said part shall not charge interest for the use of the money advanced by him up to the time of the said building being planned under roof and that said John C. Schultz shall not charge said part for his services in superintending the erection of said building and shall make no charge against said part for commissions on the purchase of said lots 14, 15, 16, 17 and 18, or, on the purchase of lots 14 and 15 in block 1 in Grand Park subdivision, the advancement of the money by said part, as above provided for, and the sale of said lot 14, as above provided for, being agreed upon as total remuneration for the services of said Schultz connected with the erection of said buildings.

It is further agreed that the said Mr. and Mrs. Schultz shall furnish to said part, weekly, full statements of moneys expended in the erection of said building with duplicates of all bills rendered or paid for material, labor, or services on said building, and also duplicates of time books, showing the labor thereon so as to keep said part fully advised of the disposition and expenditures of money advanced by him, and, that said Mr. and Mrs. Schultz, after the said building has been planned under roof, shall furnish and deliver five-thirtieths (5/30ths) of all money required for the completion of said building, such money to be furnished by them promptly from time to time as the said part shall furnish his eight-thirtieths (8/30ths) of the cost of said building.

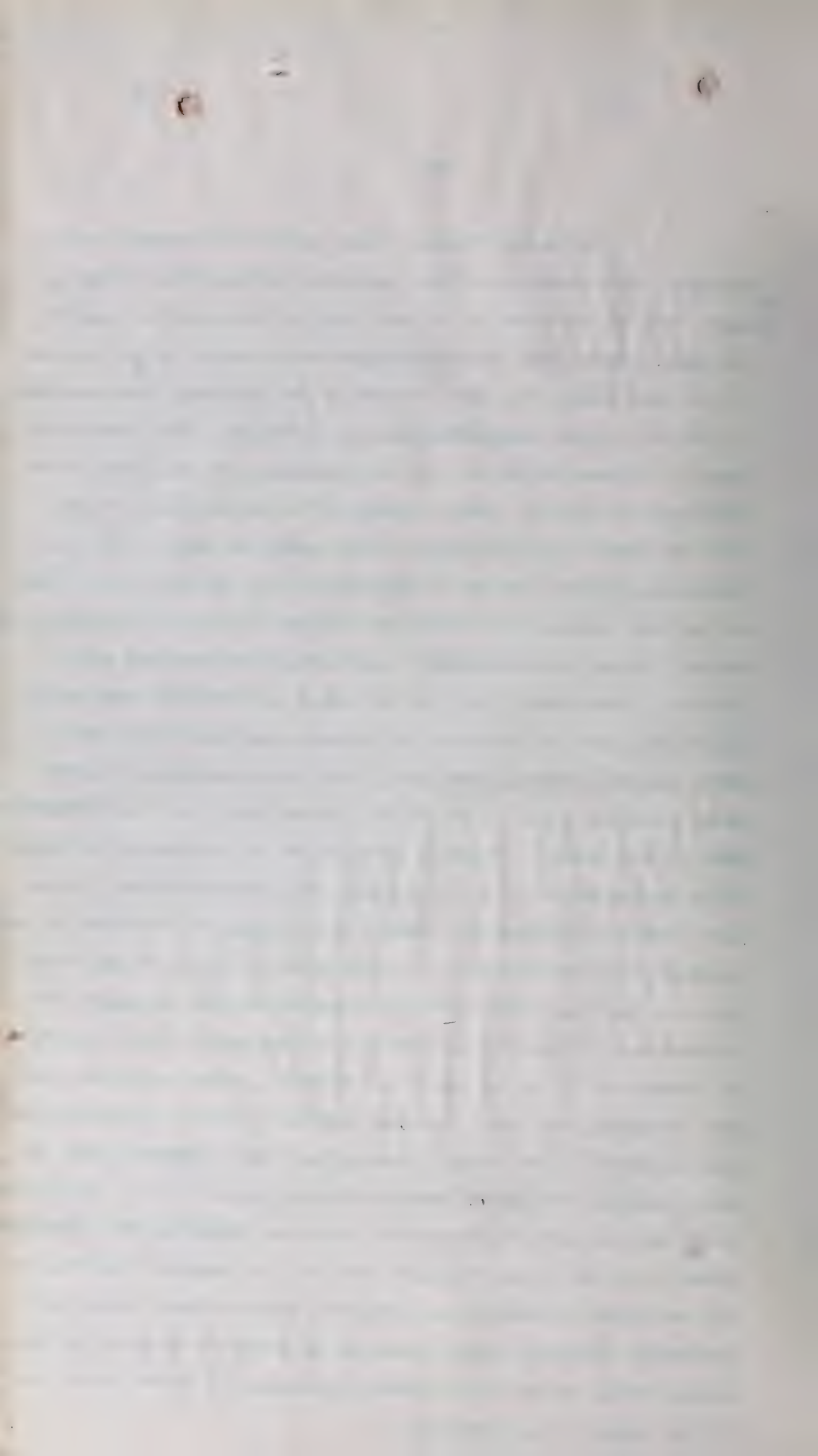
Carrie P. Schultz,
John C. Schultz,
B. S. Hart."

The record further finds that the terms of said agreement were discussed and agreed upon prior to October, 1904, and that some time in July or early in August of that year a pencil sketch of it was drawn by the said complainant and submitted to the defendants, which pencil sketch was kept in their possession for some time and then returned to Hart to be typewritten; that the written agreement was finally executed, some time prior to the departure of the complainant, in the winter of 1904-1905, to Florida; that the actual construction of the building, hereinafter referred to as the "Hart Building", began in the summer time and the work had progressed to quite an extent



598

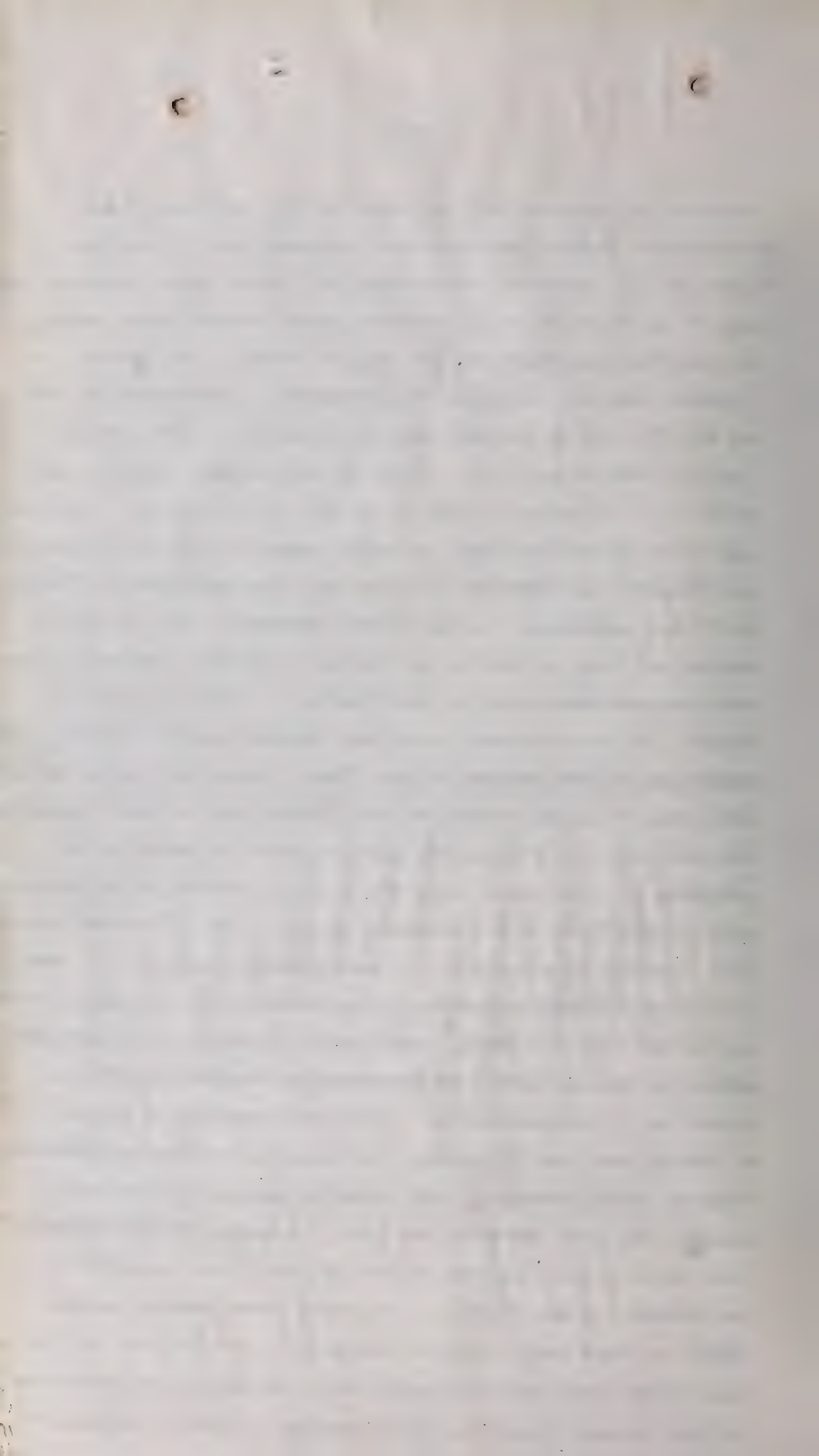
before the actual execution of the contract between the parties, and continued thereafter until the buildings were all completed, without any material interruption; that at the time the written contract was executed it was intended, as shown by the plans and specifications of the architect, to provide for the erection and completion of a block of buildings, consisting of stores on the first floor, and flats and living apartments on the second and third floors; that during the negotiations the parties endeavored to ascertain, as nearly as possible, what would be the proportions of the entire cost of the building, properly chargeable to the different portions owned by the said defendants and the portion owned by the complainant, and arrived at the conclusion that it would be fair to charge 8/13ths of the cost to Hart and 5/13ths to the two defendants; that in arriving at this conclusion they used as a basis the plans and specifications as they existed when the agreement was entered into; that during the time Hart was absent in Florida the plans and specifications, without his being consulted, were changed so as to make all the upper stories of the building an assembly hall and Masonic hall, with reception room, etc., and it became necessary to change the interior construction of the building to a very great extent, and the cost of material and labor in the portion of the building situated on lots 13 and 14 was much increased over what would have been the cost had the building been constructed on the original plans; that said Hart when advised of the changes did not protest, but was not sufficiently well versed at the time to realize how much of a difference in the cost might arise by reason of such changes and alterations; that during the erection of the building there was also a number of other alterations from the original plans, in both the north and south portions of the building, some of them being necessary in order to comply with the ordinances, and that these alterations caused a difference in the cost of the building and its



It was further found by the Grand Jury that after the completion of said Hart building, and up to January, 1908, said John C. Schultz and Carrie P. Schultz had charge of said building and collected the rents, issues and profits of said building, and paid the running expenses thereon, and they failed to turn over to the said Hart said rents, or any portion thereof; that the said John C. Schultz, as superintendent, took entire charge of the erection of said building, and attended to the purchase of materials and procured the labor therefor and had full and complete charge of the superintendence and construction of said building; but contrary to the terms of said agreement, providing that Mr. and Mrs. Schultz should furnish weekly full statements of money expended in the erection of said building, with duplicates of all bills rendered or paid; and also duplicates of time books, showing the labor thereon, the said defendants failed to make such statements or to furnish duplicates of bills or time books, during the progress of the construction of said building; that at various times prior to the filing of the bill herein the said Hart requested and demanded that the said defendants comply with the terms of said contract, with reference to the said statements, bills and payrolls; but was put off, from time to time, with different excuses made by the said John C. Schultz, only a few general statements and accounts of the progress of the building being given; that the said premises herein before mentioned, situated on the corner of Second Avenue and 11th Street, designated as "Parcel No. 2," is encumbered by two trust deeds, executed by the said Carrie P. Schultz and John C. Schultz, one to Hiram H. Rose, trustee, to secure the promissory notes of the said Carrie P. Schultz and John C. Schultz, for the sum of forty-five thousand dollars (\$45,000), with interest; the second trust deed to Arthur W. Underwood, trustee, being given to secure similar notes for twelve thousand five hundred dollars (\$12,500), with interest; that the said Carrie P. Schultz had the record



title to lot nineteen (19), in block two (2), in Brexel Park subdivision, being a subdivision of the north half of Section nineteen (19), Township thirty-eight (38) north, Range fourteen (14) east of the Third Principal Meridian, said premises being known as No. 6335 Paulina street, in the City of Chicago, Cook County, Illinois, and said premises will hereafter be designated as "Parcel No. 2"; that by warranty deed dated March 12, 1908, the said Carrie P. Schultz and John C. Schultz, her husband, conveyed said Parcel No. 2 to Selts J. DeVries, subject to a mortgage to the Ashland Trust and Savings Bank, to secure payment of twelve hundred dollars (\$1,200) and interest; that the said premises known as "Parcel No. 2" are encumbered by a trust deed executed by said Carrie P. Schultz and John C. Schultz, as William V. Whitney, trustee, to secure the promissory notes of said Carrie P. Schultz and John C. Schultz, for the aggregate sum of one thousand dollars (\$1,000), the said notes being for two hundred dollars (\$200), due in two years, and one hundred dollars (\$100), due in three years, and one hundred dollars (\$100), due in five years; that the said Carrie P. Schultz was also the owner of record of lot seventeen (17), in block seven (7), being a subdivision of the north east quarter (1/4) of the southeast quarter (1/4) of Section eight (8), Township thirty-eight (38) north, Range fourteen (14), east of the Third Principal Meridian; also known as 6342 Marshfield avenue, in the City of Chicago, Cook County, Illinois; which last described lot will hereafter be designated as "Parcel No. 3;" that Parcel No. 3 is encumbered by a trust deed executed by Carrie P. Schultz and John C. Schultz, as William V. Whitney, trustee, dated January 9, 1907, given to secure the promissory notes of the said Carrie P. and John C. Schultz, for the aggregate sum of fifteen hundred dollars (\$1,500), due respectively two hundred dollars (\$200) in two years, three hundred dollars (\$300) in three years, and one thousand dollars (\$1,000) in five years after date, with interest; that by warranty deed, dated March 12, 1908, the said Parcel No. 3 was conveyed to Selts J. DeVries, by



The said Carrie P. Schultz and John C. Schultz, her husband, there-
 being a recital in said deed that said conveyance was made sub-
 ject to a mortgage to the Ashland Trust & Savings Bank to secure
 the payment of twelve hundred dollars (\$1,200); that the said
 Carrie P. Schultz also obtained a deed from one William E. Elliott
 to lot twenty-two (22), in block four (4), in said Daniel Goodell's
 subdivision, which will hereinafter be referred to as "Parcel No.
 5," the same being conveyed to her by warranty deed dated August
 22, 1906, which was filed for record January 18, 1907, the consid-
 eration named in said deed being the sum of twenty-five hundred dol-
 lars (\$25,000), and said conveyance being subject to an encumbrance
 of ten thousand dollars (\$10,000), that since the last aforesaid con-
 veyance the said trust deed has been foreclosed; that during the
 time when materials and labor were being furnished for the erection
 of said block of buildings, on said lots thirteen (13) to eighteen
 (18), both inclusive, a street was altered and was made on the
 building and premises designated as "Parcel No. 1, and also on the
 building and premises known as Parcel No. 2; that the building upon
 the premises known as Parcel No. 3 was partly destroyed by fire during
 the time of construction of said East building, and was rebuilt dur-
 ing the time of the construction of said building; that a por-
 tion of the labor and materials, paid for and purchased out of
 the funds furnished by said East was used in making said altera-
 tions, and changes in Parcels Nos. 1, 2 and 3, and also of it in
 the construction of a building being erected by the said Schultz,
 or Mrs. Schultz, or both of them, on Parcel No. 5; that up to now
 much of said labor and materials was used in the making of said
 repairs and alterations on Parcels Nos. 1, 2 and 3, and in the
 construction of said building on Parcel No. 5, is conflicting and
 unsatisfactory; but in view of all the evidence the court finds
 that at the time when such alterations, repairs and building were
 being made and going on, and the purchased of lots were being sold
 by said John C. and Carrie P. Schultz, neither of them was filed

finally able to undertake and carry out said various deals and transactions without the aid of some of the funds of said Hart, of the material and labor purchased and paid for out of his funds. That some materials were taken from said Schlutz building and used in the Hart building; that there was such an intermingling of the funds of Hart, said Schlutz, and Mrs. Schmidt, during all of these transactions, that it is impracticable to separate them and tell just where they went, or where money really entered into the particular alterations, repairs and buildings, that the said John T. Schultz, acting as the agent of said Hart, and representing the said firm of Schultz & Company, also induced the said Hart to agree to purchase lots thirty-one (31) and thirty-two (32), in block one (1), Street West, being a subdivision of the east half of the north half of Section thirteen (13), Township thirty-eight (38) North, Range fourteen (14), East of the Third Principal Meridian, and also lots forty (40) and forty-one (41), in block two (2) in James & Fern's subdivision of the north half of the southwest quarter of Section twenty (20), Township thirty-eight (38) North, Range fourteen (14), East of the Third Principal Meridian, all in the City of Chicago, in said Cook County, Illinois; that in the purchase of all of the lots herein mentioned, or parts thereof purchased through the said Schultz for said Hart, the said Hart placed absolute reliance on said Schultz & all moneys advanced by said Hart, for the purchase of said lots, were paid out through said Schultz, or on his order, said moneys by the checks of said Hart, being deposited by said Schultz, with the Real Estate Title and Trust Company, and with the Chicago Title and Trust Company, for the purpose of being used in the payment for said lots; that the said Hart deposited with said company, at requested, on account of the purchases of said lot thirty-one (31), nineteen hundred and five dollars (\$1,905); and on account of lot thirty-two (32), two thousand dollars (\$2,000); on account of lots fourteen (14) to seventeen (17), inclusive, block four (4), Street



Park, twelve thousand six hundred and fifty dollars (\$12,650);
 on account of lot eighteen (18), block four (4), Grand Park,
 twenty-four hundred dollars (\$2,400); and on account of lots
 forty-one (41) and forty-two (42), one thousand (\$1,000); that
 out of the moneys so deposited an amount of lot thirty-one (31),
 one thousand three hundred and fifty dollars (\$1,350) was paid
 to the owner, and five hundred and seventy-five dollars (\$575) to
 the said John C. Schultz, on account of the deposit made on said
 lot thirty-two (32), one hundred fifty-six dollars and eight-
 four cents (\$156.84) was paid to Carrie P. Schultz, and ten hundred
 forty-three and sixteen cents (\$1,043.16) to John C. Schultz; the
 twelve thousand six hundred and fifty dollars (\$12,650) deposit,
 on account of lots fourteen (14) to eighteen (18), block four
 (4), in Goodwin's Subdivision, was paid out by check to one
 Solomon, the owner of said lots; out of the twenty-four hundred
 dollars (\$2,400), we deposited on account of lot eighteen (18),
 lot one (1), Grand Park, seven hundred and fifty dollars (\$750)
 was paid to John C. Schultz, one hundred and fifty dollars (\$150)
 to the J. T. Nathan, and fifteen hundred dollars (\$1,500), to
 the owner of said lot, J. C. Nathan; out of the moneys deposited
 on account of said lots forty-one (41) and forty-two (42), the owner
 received nine hundred dollars (\$900), a real estate broker named
 Campbell, one hundred dollars (\$100), and one Carl Owen, who seems
 to have had something to do with this sale, in connection with
 the said Campbell, fifty dollars (\$50); that as to lot thirty-one
 (31), a contract for its purchase was made in the name of Carrie
 P. Schultz, a short time prior to the time when Hart deposited
 said nineteen hundred and five dollars (\$1,905), for the purchase
 of said lot thirty-one (31), and a deposit of twenty dollars
 (\$20) paid to the owner, Mr. Doyle; but the lot was turned over
 by Hart in the final stamp, and the moneys deposited by him for
 its purchase were paid out as above stated. The said Hart had no

knowledge that Mr. and Mrs. Schultz, or either of them, had any
 interest in said lot; that as to lot thirty-two (32), one Markham,
 the owner of lots thirty-two (32) and thirty-three (33), had
 contracted to sell the same to a Mr. Bain, that on May 31, 1904,
 an assignment of Bain's interest in lot thirty-two (32) was made
 to Winger, and that lot conveyed to said Winger; that on or about
 August 4, 1906, Mrs. Schultz purchased Mr. Bain's interest, under
 said contract in lots thirty-two (32) and thirty-three (33) for
 (\$100) in the contract price, twenty-one hundred dollars (\$21,000),
 agreed upon between her and Bain; that on August 14th, Mrs. Schultz
 gave her check for nine hundred and six dollars and eighty-four
 cents (\$906.84) to Bain, on account of this purchase, and on
 August 15th she received the said check for nine hundred and fifty-
 six dollars and eighty-four cents (\$956.84) from said Real Estate
 Title and Trust Company, September 8, 1906, said John C. Schultz
 received said check for ten thousand and forty-three dollars and
 sixteen cents (\$1,043.16); that Mr. Schultz testified he used this
 ten hundred and forty-three dollars and sixteen cents (\$1,043.16)
 in the Hart building, not being able at that time to get a deed
 from the owner of lot thirty-three (33), and it appears that when
 the deed was ready for delivery, the balance due was not being forth-
 coming, the owner's agents refused to deliver the deed and it is
 still held awaiting the payment of said balance; that Mr. Hart
 has never received anything for the money advanced by him to pur-
 chase said lot thirty-two (32); that as to lot thirty-three (33), which
 one (1), is known as the original owner was one William, the
 lot, prior to July 16, 1904, authorized a real estate agent, W.
 McEllan, to sell for fifteen hundred dollars (\$1,500); that a con-
 tract was entered into about July 1904, in the name of Mrs.
 Schultz, to purchase this lot for seventeen hundred dollars
 (\$1,700), and twenty dollars (\$200) being deposited, which sum
 was later assigned to Mrs. Krawar; that in the final

... Mr. Hart made the deposit of twenty-four hundred dollars (\$2,400), where mentioned, and the said sum was distributed as above stated, that the said check for seven hundred and fifty dollars (\$750), payable to Mr. Schultz, on account of this lot mentioned, was endorsed by him and then endorsed by Mrs. Schultz, and deposited in her account, and finally two checks of Mrs. Schultz, one for one hundred and fifty dollars (\$150) and one for six hundred dollars (\$600), were paid to a Mrs. Kramer; that Mr. Schultz testified that he represented Mrs. Kramer, who had the contract, and that seven hundred and fifty dollars (\$750) was paid to her; that said Hart has received deeds of conveyance to all of the lots as agreed to be purchased by him, except as to lot thirty-two (32), for which lot he has never received any deed; that there are also some abstracts and title papers belonging to the said Hart, in the possession of said Schultz and Company, or one of them, which he has been unable to obtain.

The decree then makes findings with respect to transactions with one John Pischewak, the father of Mrs. Schultz and formerly one of the defendants in this proceeding, which, in view of the record, it is not necessary to state.

The decree then proceeds to find that the said John S. Schultz repeatedly assured the said Hart that the title to said lot thirteen (13) was clear in Carrie P. Schultz, there being no encumbrance thereon, and that a guarantee policy of title had been obtained on said lot thirteen (13), but that the same had been lost, and that such policy was never delivered to said Hart. Finally, the said Hart caused an abstract of title to said lot thirteen (13) to be made, at a cost of \$73, and it was ascertained that said lot thirteen (13), was encumbered by a trust deed dated February 8, 1906, executed by Carrie P. Schultz and husband, to John H. Fink, trustee, and given to secure the note of said Carrie P. and John C. Schultz, for the sum of \$1,000, due three years after date with interest at six per cent per annum, payable semi-annually;

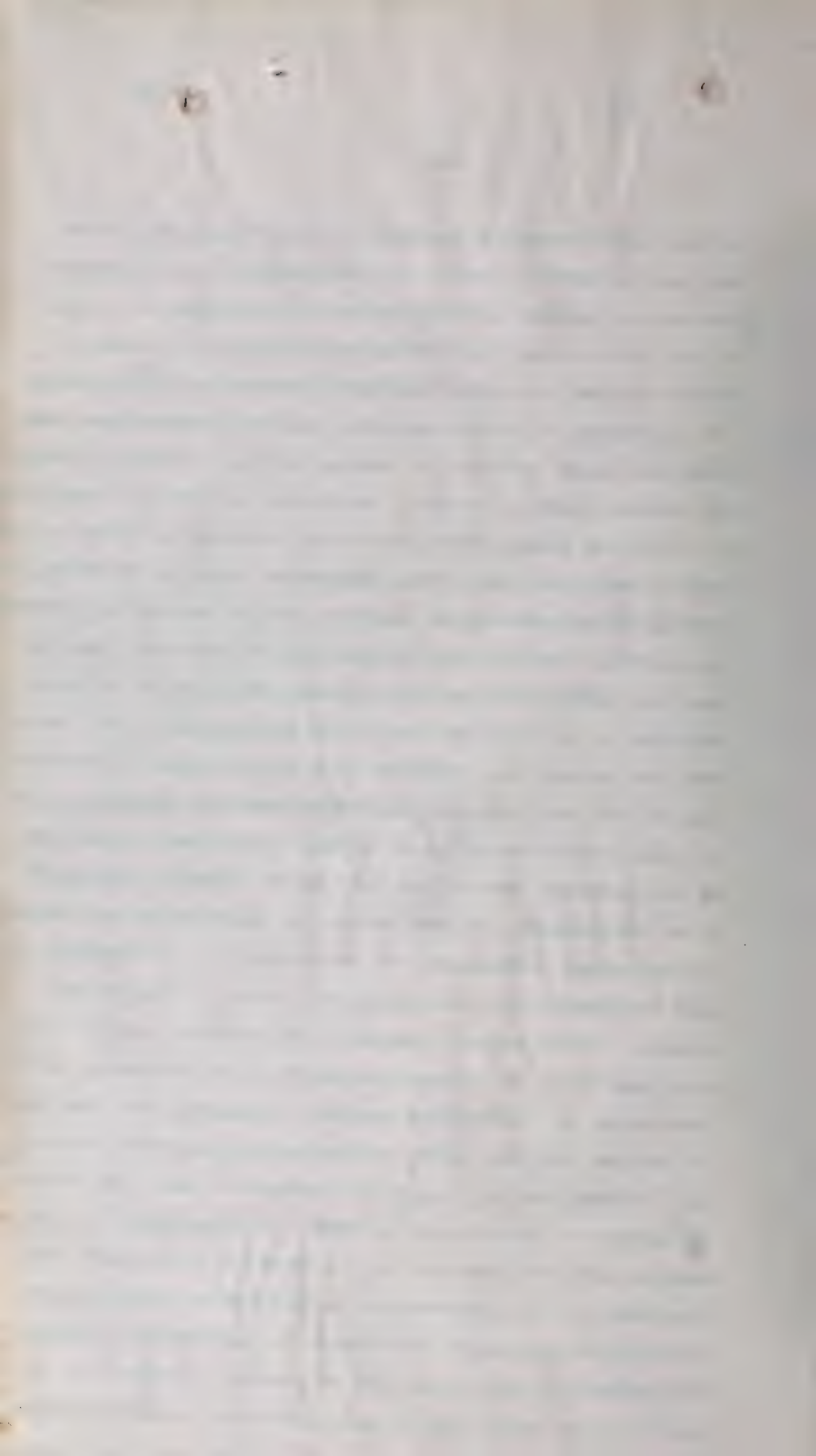
The first part of the paper discusses the importance of the study of the history of the English language. It is noted that the English language has a long and varied history, and that the study of its development is of great importance to the understanding of the language itself. The paper then goes on to discuss the various factors which have influenced the development of the English language, such as the influence of other languages, the influence of the social and cultural environment, and the influence of the individual writers and speakers. The paper concludes by stating that the study of the history of the English language is a fascinating and important field of study, and that it is one which should be pursued by all who are interested in the English language.

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607

that said Gerrie F. Schultz and the said John F. Schultz, one
 witness of them, have paid or offered to pay, to said Hart, the
 sum of \$1,000, being the balance due upon said 1st Mortgage (14),
 under the terms of said agreement, bearing date October 2, 1916;
 that prior to their meeting the complainant, neither of the de-
 fendants nor the firm of Schultz & Co. was financially able to
 carry out the various real estate deals into which they entered
 on their own account; that they derived some income from the rents
 of the Capitol Building, but that these were insufficient to
 cover the large expenditures made by them; that the funds received
 from Hart were used by the defendants, individually or as members
 of the firm of Schultz & Co., indiscriminately, in the construction
 of the said Capitol Building, and in making alterations, changes and
 repairs on the different portions of the building; that the funds so
 advanced by Hart were mingled with the funds of the defendants or
 their said firm; that no proper accounts were kept by them, or if
 such accounts were kept, they have been destroyed or concealed; that
 the defendants failed to make proper statements showing what had
 been done with the funds so advanced, and were unable to furnish the
 complainant with information such as would enable him to have sat-
 isfactory accounts prepared; that for months prior to the filing
 of the bill complainant was endeavoring to get some sort of account
 or statement and in arriving at some settlement; that although a large
 number of bills or statements and receipts were produced and sub-
 mitted to an accountant connected with the complainant, it was im-
 practicable to arrive at any accurate settlement of their accounts
 and differences; that prior to the filing of the bill of complaint
 Herald W. Hart was informed that the said John F. Schultz had pre-
 pared, or had caused to be prepared for him, certain pay rolls, and
 was having false time books prepared to correspond with said certain
 pay rolls, evidently with the intention of being able to arriving
 at a settlement with the said Hart; and after the bill was filed
 the said Schultz having been present and conversed with the said Hart that

he was unable himself to account for all of the moneys which had been advanced to him by said Hart and that in his desperation he had prepared said pay rolls and time books to aid him in his difficulties, that during the progress of the hearing before the court the said defendants produced no further copies of statements, bills and receipts, and also produced some bank books and checks and stubs of checks, but they failed to produce any accurate books of account, and failed to produce a large number of other bank books, checks and stubs, claiming that they had been lost or destroyed; that it was impossible, from the evidence, to make up any satisfactory or accurate detailed account as between the parties, from the bills produced by the defendant Schultz; that Mrs. Schultz did not have personal knowledge of the exact situation at any time and part of the wrong dealings of Mr. Schultz were done without her knowledge or at least without a true appreciation of what was going on, she acting under his dictation, as a but being associated with her husband, as she was, and having a part in the different parts of Mr. Hart and Mr. Schultz and herself, be so intermingled, she could suffer the consequences and suffer her wrongs and differences with her husband and partner; that the said defendants, John C. Schultz and Carrie P. Schultz, are trustees and the moneys advanced by the said Hart should be treated as a trust fund, to be accounted for by said defendants, in the same manner as trustees are required to account; that Hart should be credited with all moneys so advanced by him, with an account of said building and an account of purchase of lots, and the said defendants be charged with the same, and given credit for all sums as have been expended for the benefit of said Hart, under the terms of said partnership and in accordance with the understanding and agreements had between the parties with reference to the purchase of said lots, said defendants, however, only be entitled to a credit for the moneys actually received by them from the sale of said lots so purchased and for the legitimate expenses



Schultz and Carrie P. Schultz, or either of them, have not produced sufficient competent evidence to show what the actual cost of said Hart building was, and have stated that they have no further evidence to produce; that in the absence of competent evidence, to show the actual cost of said Hart building, by said defendant, Schultz, the best evidence as to the cost of said building is contained in the detailed statement or estimate agreed upon by complainant as Exhibit No. 120; that the figures five-thirteenths and eight-thirteenths mentioned in said agreement were intended to stand for the actual cost of the respective portions of said building, and are to be used in the accounting between the parties, eight-thirteenths ($8/13$ ths) of such cost to be charged to said complainant, Hart, and five-thirteenths ($5/13$ ths) to be charged to said defendants, John C. Schultz and Carrie P. Schultz, of his or their respective portions; that Mr. Hart waived his right to have said premises constructed in accordance with the original plans and specifications; that in settling at the amounts to be charged to the defendant, Schultz, from date to date, up and after May 1, 1907, as the Hart building progressed and until August 22, 1907, at which time enough money had been advanced by the complainant, Hart, to the said John C. Schultz, to pay for the building, the fractions five-thirteenths are to be used, charging the same to the defendants, Schultz, and eight-thirteenths to the complainant Hart, as the result thus obtained approximates the total amount chargeable to said party and aggregates the entire cost of the Hart building as built; that the north portion of the building known as the Hart building, containing halls, cost, when completed, exclusive of builders' profit, the sum of \$31,922.42, which amount should be charged to the defendants, John C. Schultz and Carrie P. Schultz, and the south portion of the building, containing the main part, when completed, exclusive of builders' profit, the sum of \$12,130.00

making the entire cost of the building, as stipulated, \$14,175.00, the sum of \$14,175.00 is charged to the complainant's account on May 1, 1907, when the Hart building was under roof, the complainant had advanced to the defendant, John C. Schultz, the sum of \$47,125.00 on account of said building, and within thirty days of said May 1, 1907, under the terms of the agreement herein set out, the defendants, John C. Schultz and Carrie F. Schultz, were to repay 5/12ths of said sum to said complainant; that from May 1, 1907, to August 22, 1907, the complainant had advanced to the said defendant John C. Schultz the total sum of \$84,300, which sum is \$47.44 in excess of the amount required to complete the Hart building; that from August 22, 1907, to December 22, 1907, inclusive, the complainant advanced more than \$14,300, the exact amounts being detailed with the dates of such advancements to the said John C. Schultz, upon representations by him to the complainant that the said sums were necessary to pay for lumber and material in the said Hart building; that subsequently thereto, in order to prevent mechanics' liens being filed against said premises, and to pay for material and lumber which went into the said Hart building, the complainant advanced certain sums, and also advanced other sums of money to pay for necessary furnishings for the halls in the north portion of said Hart building, and for an electric fan for use in said halls, etc.; that the amount to be charged to the defendants on account of their portion of the building is \$81,930.00, that evidence was taken before the master with reference to all matters hereinbefore set forth.

The decree then recited the deduction to be made from the amounts allotted by the master, and sets forth the final order heretofore stated in this opinion.

The documents filed as briefs by the appellants comply with Rule 32 of this court. They consist of printed copies of the facts of the case, upon which were suggested the views of the appellants upon the proposition advanced that the construction placed by



the contract by the master and chancellor is erroneous. The position of counsel is not supported by the citation of any reported decisions upon this question in any other legal proceedings in the case. Counsel for appellee have filed a brief upon the duties imposed by law upon trustees, and upon the jurisdiction, once obtained, of courts of equity to do complete justice between the parties, also upon questions of evidence raised, or attempted to be raised, in the case. No reply briefs have been filed by the appellants.

After careful consideration of all the assignments of error filed by the appellants, and a careful perusal of all the facts as disclosed by the enormous record which has been filed, we have reached the conclusion that no error has been alleged by appellants which should result in the reversal of the decree rendered.

It is suggested by counsel for the appellant Carrie E. Schultz that the decree is erroneous in that it does not provide that if the appellant pay her share of the cost of the land tax, the complainant shall convey to her late thirteen and one-half acres, etc. The same point is also made by counsel for the appellant John C. Schultz. Counsel for the appellee admit that such a provision in the decree would have been proper, but insist that by the terms of the decree the payment of the amount within sixty days after the entry of the decree would necessarily have required a reconveyance to Mrs. Schultz. When the case is again before the Circuit Court the decree, in this regard, may be modified, if such a modification is still desired.

Gross errors filed by the appellee are based upon three propositions: first, that the court erred in rendering decree against appellee taxing him with one-half of the estate; second, that the court erred in certain credits or reductions made in certain items found in the master's findings; and third, that the court erred in rendering decree allocating the estate as to certain

Small estate admitted.

1911

With reference to the last two lines mentioned, which have to do with particularly with questions of fact, as one of the parties has been with the appellate

It is quite apparent from a reading of the record that all of the difficulties which have been avoided if appellants had accepted the offer of judgment and the offer of judgment had been accepted, they would have been avoided, and the proper vouchers showing the amounts, and refused to produce the cancelled checks which they alleged had been given in payment of taxes, materials, etc., that had been the building, which were then retained after payment. The fact that the condition of the appellee, who at the time of the trial was upwards of 74 years of age.

We are of the opinion that all the errors of the proceedings should have been based against the appellants. The facts will therefore be affirmed with an order of costs and the case remanded with instructions to the trial court to amend the decree in the respect indicated. The costs of this writ will be taxed to appellants.

APPEAL IN FACT AND
REVEREND IS DONE.



182 I.A. 389

ERROR TO MUNICIPAL
COURT OF CHICAGO.

Y3.

JOHN CLANEY and W. F. DICKINSON,
Plaintiffs in Error.

WGS BANK,
Defendant in Error,

P. DICKINSON,
Plaintiffs in Error.

WGS BANK,
Defendant in Error,

P. DICKINSON,
Plaintiffs in Error.

A statement of claim was filed, to which was attached a copy of the note, with endorsements as above set forth. An affidavit of defense was filed by one of the defendants, in which it was stated that the nature of the defense of the defendants to the suit was "that it appears that the suit was instituted by the Louisa County Savings Bank of Columbus Junction, Iowa, when as a matter of fact as shown by Exhibit A filed herein, that the note in suit was given by the defendants herein to one E. A. Lacey, Cashier or order at the Louisa County Savings Bank of Columbus Junction, Iowa for the sum of \$3000 with interest at seven per cent (7%) per annum from date, and it further appears that Exhibit A as to

1821.A.388

1821.A.388

COUNT OF CHICAGO

JOHN CLARK AND W. J. CLARK
CHICAGO, ILL.

THE COURT ORDERED THAT THE OPINION OF THE COURT

SHOULD BE RECORDED BY THE CLERK OF THE COURT

AGAINST THE DEFENDANTS (PLAINTIFFS IN ERROR) AND A WRIT OF HABEAS CORPUS
ISSUED BY THE DEFENDANTS TO "W. A. LARSEN, CLERK OF COURT,
IN THE HOUSE COUNTY SAVINGS BANK, COLUMBUS JUNCTION, ILL." WAS
RETURNED 18, 1921, FOR \$2,000. THERE APPEARED ON THE RECORD THE
ORIGINAL, "BY FIRST NATIONAL BANK CHICAGO, ILL. IN ORDER (NO.
1234) RECOGNITIVE ENDORSEMENT (WITNESSED) BY W. A. LARSEN,
CLERK OF COURT, COLUMBUS JUNCTION, ILL. IN ORDER (NO.
1234) ALSO AN ENDORSEMENT SHOWING THAT \$2,000 WAS PAID ON THE PRINCIPAL
AND \$1,000 ON THE INTEREST.

A statement of claim was filed, to which was attached
a copy of the note, with endorsement as above set forth. An affidavit
was filed by one of the defendants, in which it
was stated that the nature of the defense of the defendant to the
claim was "that it appears that the suit was instituted by the
Larson County Savings Bank of Columbus Junction, Iowa, when as a
matter of fact as shown by Exhibit A filed herein, that the note in
question was given by the defendant herein to one W. A. LARSEN, CLERK
OF COURT, COLUMBUS JUNCTION, IOWA, and is further apparent that Exhibit A as a

the endorsements on said note that the same was made payable to the First National Bank of Chicago, Illinois, by the Louisa County National Bank of Columbus Junction, Iowa, E. E. Lacey, Cashier."

By permission of the court, an amendment to the statement of claim was filed, but not sworn to, striking out of the copy of the instrument sued on and attached to the statement of claim, all matter appearing under the heading "Endorsements," and inserting in lieu thereof the following: "E. E. Lacey, Cashier, July 10th, 1911, paid on Prin. \$500.00 E. E. Lacey, Cashier." The defendants were given by order of court three days in which to file an affidavit of merits. Thereafter on motion of the defendants it was ordered that the affidavit of merits filed to the original statement stand as to the amended statement of claim herein. Thereupon the court, on motion of the plaintiff, struck the defendants' affidavit of merits from the files, and made a finding upon which judgment was entered in favor of the plaintiff and against the defendants in the sum of \$2,943.48.

The record shows that a demand for a jury was made by the defendants at the time of the filing of their appearance. In the "Statement of Facts" signed by the trial judge the foregoing facts were recited, and the further fact that a witness testified that he had calculated the amount of the principal and interest, and found the sum to be as set forth in the finding; that the defendants declined to introduce any evidence; "that a correct statement of the facts found by the court is as follows: 1st, that said note as shown in the original statement of claim was executed by the defendants and endorsed as appears in the original statement of claim as amended; 2nd, that the amount of principal and interest unpaid on said note is Twenty-nine Hundred Forty-three and 28/100 (\$2943.28) Dollars." The court further in the statement certifies that the questions of law involved are, 1st, whether the defendants were entitled to a jury trial; 2nd, whether the plaintiff was the owner of said promissory note and the person entitled to maintain

the respondents on said note that the same was duly repaid in
the First National Bank of Chicago, Illinois, by the Eastern Guaranty
National Bank of Columbia Junction, Iowa, E. E. Jacey, Cashier.
By production of the note, an amendment to the above
part of claim was filed, but not sworn to, setting out of the
copy of the instrument used on and attached to the statement of
claim, all matter appearing under the heading "Interests," and
inserted in lieu thereof the following: "E. E. Jacey, Cashier,
First Nat. Bank, 1911, Main on Trial, 1911, E. E. Jacey, Cashier."
The defendants were given by order of court three days in which
to file an affidavit of denial. Thereafter an action of the
plaintiff was entered that the affidavit of denial filed in the
original statement stand as to the amended statement of claim herein
in. Thereupon the court, on motion of the plaintiff, struck the
defendants' affidavit of denial from the file, and made a finding
that said instrument was entered in favor of the plaintiff and
against the defendants in the sum of \$2,941.48.
The record shows that a demand for a jury was made by
the defendants at the time of the filing of their answer. In
the "Statement of Facts" signed by the trial judge the foregoing
facts were recited, and the further fact that a witness testified
that he had collected the amount of the principal and interest,
and found the sum to be as set forth in the finding; that the
defendants declined to introduce any evidence; "that a correct state-
ment of the facts found by the court is as follows: 1st, that said
note as shown in the original statement of claim was executed by
the defendants and endorsed as appears in the original statement
of claim as amended; 2nd, that the amount of principal and interest
originally said note is Twenty-nine Hundred Forty-one and 48/100
(\$2,941.48) Dollars." The court further in the statement certifies
that the question of law involved was, 1st, whether the defendants
were entitled to a jury trial; 2nd, whether the plaintiff was the
owner of said promissory note and the person entitled to maintain

said action thereon. And the decisions of the court upon said questions were, 1st, that the defendants were not entitled to a jury trial in said cause, and, 2nd, that the plaintiff was the owner of the promissory note in the suit and the person entitled to maintain a suit thereon.

The plaintiff being the legal holder of the note, the endorsements, indicating that the note had been sent to Chicago for collection, should have been disregarded, as they were by the trial court.

The right of a jury trial, the same having been demanded by the defendants at the time of entering their appearance, seems to be a matter of some doubt in view of the decisions. Its denial has been held to be reversible error. *Koch v. Dickinson*, 159 Ill. App. 413; *Eberhart v. Foster*, 165 id. 175. Where, as in the present case, the court, under the evidence in the case, would have been obliged to direct the jury to find a verdict for the plaintiff, in exact accord with the finding made by the court, the failure to call a jury has been held not to be reversible error, the idea being that if the action was erroneous the error was harmless. *Second National Bank of Saginaw v. Clancy*, 178 Ill. App. 427. The decision last referred to is the latest of which we have cognizance, and as a writ of certiorari was denied by the Supreme Court, and the opinion thus made final, we deem it decisive of the point at issue. The judgment will be affirmed.

AFFIRMED.

...and the

The plaintiff being the legal holder of the note, the defendant, indicating that the note had been sent to Chicago for collection, should have been requested, as they were by the trial

The right of a jury trial, the issue having been determined by the Supreme Court in the case of *Wainwright v. Mientkowski*, 353 U.S. 59, 80 S. Ct. 139, 17 L. Ed. 2d 329, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 26

APPENDIX

67 - 17586.

THOMAS PISER,
Plaintiff in Error,
vs.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

SEROTA and GANS, doing business
as SEROTA & GANS, AMERICAN BADGE
COMPANY, a corporation, FRANK
SMITH, A. L. MENDELSON and MAX
GUTKOWSKY,
Defendants in Error.

1821 A. 390

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

The following statement of facts made by the
attorney for plaintiff in error is adopted by defendant in
error:

"This is an action in assumpsit upon the following
promissory note:

'Chicago, Ills. Aug. 18th 1904.
Six months after date we promise to pay to the
order of A. L. Mendelson.....\$500.00
Five Hundred and no/100 Dollars
at 157 Fifth Ave. Chicago Ills.
Value received 6% interest per annum.
SEROTA & GANS.'

(Above note stamped on face as follows):

'Protested for non-payment. Chicago, Ills.
February 14, 1905.

MARTIN MUSSING, Notary Public.'

and endorsed on back thereof as follows:

'American Badge Co.
Frank A. Smith, Pres.
A. L. Mendelson.
Max Gutkowsky.'

"The court permitted the defendant, Frank A. Smith, the
president of the defendant American Badge Company, a corpora-
tion, to testify that at the time of the making of the en-
dorsements he had no intention and did not attempt to indorse
the note as an individual. The note was never paid.

"It was not denied upon the hearing that the plaintiff
was a bona fide holder for value of the instrument in question.
Outside of the question of the admissibility of this particular
part of the evidence, the questions presented for review are
purely propositions of law arising from matters appearing on
the face of the note itself.

"It is practically admitted by the plaintiff that the
indorsement of the defendants American Badge Co. and Frank A.

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

1911, No. 1

Smith was for accommodation only. While the plaintiff testified that the makers of the note told him that the money was being raised for the purpose of paying part of it to the American Badge Company, so that at the time of the paying of the money by the plaintiff he had no notice of the character of the defendants as accommodation parties, the truth seems to be that they were in fact accommodation parties, and never received any part of that money.

"The defendant Frank A. Smith was, at the time of the indorsement of the note, and ever since then and at the commencement of this suit, the president and general manager of the American Badge Company, and the evidence shows that Serota & Gans, the makers of the instrument, went out of business shortly after the making of the note, and from the testimony of the defendant, it seems that they went into bankruptcy. At any rate it was admitted that they were insolvent at all times since the making of the note. A number of propositions of law were presented to the court, some of which the court held as the law, and some of which it refused. These propositions of law fully present the questions involved in this case for review."

The suit was begun by the assignee of the original payee of the note against Serota & Gans, the makers of the note, the American Badge Company, a corporation, and Frank A. Smith, as accommodation endorsers, A. L. Mendelson, the payee and assignor, and Max Gutkowsky, also as an endorser. The summons was served on the American Badge Company and Frank A. Smith, and they entered their appearance by attorney and filed their affidavit of merits under the rules of the Municipal Court, in which affidavit of merits they say that Smith did not endorse, or in any way guarantee the note or promise to pay it or any part of it, and that the Badge Company did not endorse the note; that the alleged endorsement thereon in its name is not its endorsement, and was not written by any one having authority so to do, and that it never guaranteed or undertook or promised to pay the note. Neither of the other defendants were served with summons or appeared in the case. The case was tried by the court without a jury and resulted in a finding for the defendants who were served and a judgment against the plaintiff in bar of his right to recover and for costs.

Plaintiff in error has presented by his argument five propositions from which he insists his right to recover

is shown. These five propositions briefly are

1. That when a corporation has power to issue negotiable securities, a bona fide holder of such an instrument bearing its signature has the right to presume that the same was issued with authority and its irregular issuance constitutes no defense.

2. That negligence on the part of a holder of negotiable paper, in failing to ascertain whether the maker is liable thereon or not will not, in the absence of proof of bad faith, deprive him of the character of a bona fide holder.

3. That the abbreviation "Pres.", after the name "Frank A. Smith", was descriptio personae merely.

4. That as there is no ambiguity in the wording of the endorsement extrinsic evidence is not admissible to show who Smith intended to bind when he endorsed the note.

5. That a person who assumes to act as an agent for another impliedly warrants that he has authority to so act, and if in fact he had no such authority he is himself liable to one who deals with him in good faith.

As to the first of these contentions, the evidence discloses that the American Badge Company was a commercial corporation. Of such a corporation the Supreme Court in Wheeler v. Home Savings & State Bank, 188 Ill., 34, says:

"Such a corporation has no corporate power to become the mere surety of another or pledge its property for the payment of the debt of another in which it has no interest or for which it is in no wise responsible and for mere accommodation." See also Schneider v. Chicago Vulcanizing Co., 159 Ill. App., 622; Central Trans. Co. v. Pullman P. C. Co., 139 U. S., 34; and National Home Bldg. Ass'n v. The Home Savings Bank, 181 Ill., 38.

A corporation has no natural rights or capacities, whatever right or power it has is gathered from its charter, and persons dealing with corporations having limited powers derived from the law through its charter, are chargeable with

in shown. These five propositions briefly are:
1. That when a corporation has power to issue negotiable securities, a proper right holder of such an instrument having the signature and the right to receive the same, was treated with authority and its irregular issuance constitutes no defense.

2. That negligence on the part of a holder of negotiable paper, in failing to ascertain whether the paper is issued or not at all, in the absence of proof of bad faith, relative to the character of a proper right holder.

3. That the statement "I have", "I own" and "I hold" are absolute statements.

4. That as there is no ambiguity in the wording of the statement "I have", "I own" and "I hold" it is not necessary to show that the holder was not misled when he received the same.

5. That a person who assumes to act as an agent for another implicitly warrants that he has authority to do so, and it is not in fact he has no such authority he is himself liable. It was also held in Good Faith.

As to the first of these contentions, the evidence discloses that the American Water Company was a corporation. It was a corporation the Supreme Court in Illinois v. American Water Co., 128 Ill. 121, 122, 123.

"That a corporation has no natural rights or obligations, but is merely a creature of law, and that the payment of the debt of another or the right to the property of another is not a right which it has no interest or for which it is not responsible and for which it is not liable." Illinois v. American Water Co., 128 Ill. 121, 122, 123.

A corporation has no natural rights or obligations, but is merely a creature of law, and that the payment of the debt of another or the right to the property of another is not a right which it has no interest or for which it is not responsible and for which it is not liable." Illinois v. American Water Co., 128 Ill. 121, 122, 123.

knowledge of its powers and limitations and can not be heard to deny such knowledge where lack of power is urged as a defense, for every one is presumed to know the law and no one is permitted to plead ignorance of it as a means of evading liability on his part, or of establishing a liability on the part of others to him. National Home Building Ass'n v. The Home Savings Bank, 181 Ill., 35.

Appellant knew all about the circumstances under which the American Badge Company endorsed the note in question. He testified that it was on his advice and suggestion to Mr. Gans of the firm of Serota & Gans that the Badge Company were asked to endorse the note; that he told Gans "if you will get their endorsement, I will try to get you the money from a friend of mine". The note was brought to him by Gans after it was endorsed by the Badge Company and he did procure the money on it from one A. L. Mendelson. He knew the business in which the American Badge Company was engaged was a mercantile business. He saw the endorsement of the Badge Company on the note placed there by its president over his signature as president. The name of the Badge Company was in form a corporate name. It was signed as corporate names are usually signed by a person who designated himself as an officer of a corporation. So signed, it was prima facie the signature of a corporation. Fry v. Tucker, 24 Ill., 181. The Badge Company was, in fact, a corporation. He, therefore, before he became the owner of the note, and in fact before the note was negotiated to any one, had full notice of the fact that the American Badge Company was a mercantile corporation; that it was an accommodation endorser on the note, and that in law it could not bind itself as an accommodation endorser. While one dealing with a corporation having authority to issue negotiable paper in due course of business may usually presume that such paper apparently so issued ^{was issued} with authority and

knowledge of the powers and limitations and can not be held
to any such knowledge more than of power is known to a
person, for every one is presumed to know the law and no
one is permitted to plead ignorance of it as a means of avoid-
ing liability on his part, on of establishing a liability on
the part of another in law. Official Code of Georgia

The First National Bank, Inc.,

... I am not sure if about the circumstances under
which the business of the Company was conducted and also in question.
It is stated that it was on his notice and suggestion to do
this of the firm of George A. Stone and the Stone Company were
asked to execute the note; that he told Stone "if you will

get their endorsement, I will pay for you the money from a
check of mine". The note was brought to him by Stone after
it was returned by the Stone Company and he did produce the
money on it from one A. L. Stone. He knew the business
of the Stone Company and was not a stranger.
The note was placed there by its president over his signature
as president. The name of the Stone Company was in law a
corporate name. It was signed by its president and was legally

signed by a person who designated himself as an officer of
the corporation. He signed, if the name of the Stone
Company was in law, a corporation. He, therefore, before
he became an owner of the note, and it was before the note
was returned to any one, had full notice of the fact that
the American White Company was a corporation; that
it was an incorporation contract on the note, and that in law
it could not bind itself as an incorporation enterprise. While
one dealing with a corporation having authority to issue
negotiable paper in the course of business may usually presume
that such paper represents as issued by the authority and

regularly, such presumption can not prevail to protect one who buys paper having an endorsement which he knows to be the accommodation endorsement of a corporation, and which he knows that corporation has no authority to make.

The second proposition may be an accurate statement of the law, but in this case the question of negligence of the holder of the note is not involved. Plaintiff in error is conclusively presumed to know that under the law defendant in error, the American Badge Company, could not legally become an accommodation endorser of negotiable paper. Even if one may be safe, although negligent, in dealing with negotiable paper without finding out whether it is properly issued, that rule can not avail one who deals in such paper knowing it to have been issued without authority. Knowing that the corporation could not bind itself or be bound as an accommodation endorser of negotiable paper, plaintiff in error can not be held to be an innocent purchaser of it, but must be held to have purchased it subject to all defenses arising from the lack of power of defendant in error to become such endorser.

The third proposition that the addition of the abbreviation "Pres." after the name Frank A. Smith is merely descriptio personae might have more force, if "Frank A. Smith, Pres." was all there was of the endorsement, but it is not. (The name "American Badge Co." precedes the words "Frank A. Smith, Pres.", so that the entire endorsement, on which it is sought to bind defendants in error, is "American Badge Co., Frank A. Smith, Pres." This endorsement could receive but one construction by persons of average business experience. It needs no extrinsic evidence to show this endorsement to be that of the American Badge Co., placed there by its president. The omission of the word "by" or the word "per", before the name of the president, is insignificant. The name of the corporation could not have been written by the corporation

...the fact that the corporation has no authority to make, ...
...the corporation has no authority to make, ...
...The second proposition may be an adequate statement
...but in this case the question of negligence of
...the fact of the case is not involved. ...
...is wholly irrelevant to know that under the law defendant
...in view of the fact that defendant would not incur liability
...of compensation and/or of negotiable paper. ...
...was a party, although negligent, in dealing with negotiable
...paper without finding out whether it is properly issued, that
...this act and will not be held liable for such paper issued it is
...that the fact is not negotiable. ...
...which could not be held liable for an endorsement
...power of negotiable paper, liability in such case not be
...held to be an innocent purchaser of it, but must be held to
...have purchased it subject to all defenses arising from the
...lack of power of defendant in such to become such endorsement.
...The third proposition that the addition of the
...definition of "fact", after the name Frank A. Smith is merely
...~~...the fact that the corporation has no authority to make, ...~~
...fact, and his share one of the endorsement, but it is not.
...The name "American Bridge Co." precedes the name "Frank A.
...Smith, Pres.", so that the entire endorsement, in which it is
...ought to find defendant in error, is "American Bridge Co.,
...Frank A. Smith, Pres.". This endorsement would be valid but
...one constituted by persons of proper business character.
...It needs no further evidence to show this endorsement to
...be that of the American Bridge Co., established by the words
...defendant. The addition of the word "fact" or the word "pres", before
...the name of the president is immaterial. The name of
...the corporation could not have been written by the corporation

itself. It must have been written by some natural person. Before it can be construed to be the signature of the corporation it must have been affixed by some officer or agent of the corporation. In order that the signature of a corporation may have the insignia of genuineness, it is usual for the person who affixes it to add his name, together with some word or expression indicative of the capacity in which he acts in so doing. When this is done by a duly authorized officer or agent, the act is construed to be the act of the corporation, and not the personal act of the officer or agent, unless there is something in the writing signed or the signature itself to indicate a purpose on the part of such officer or agent to bind himself and not the corporation. Meehan on Agency, Sec. 432. In Draper v. Mass. Steam Heating Co., 5 Allen (Mass.), 333, the signature "Massachusetts Steam Heating Company, L. S. Fuller, treasurer", was held to be the signature of the corporation and not the personal signature of Fuller. In Reed v. Fleming, 308 Ill., 390, a promissory note signed "William S. Reed, Pres. Mt. Carmel Lgt. & Water Co." was held to be the signature of the corporation and to create no obligation on the part of Reed personally. In that case the seal of the corporation was also affixed to the note which of itself imported a corporate act.

The fourth point is well taken. While under some circumstances extrinsic evidence is admissible to show who it was intended to bind by a signature (Frankland v. Johnson, 147 Ill., 530), in this case the intent to bind the corporation and not Smith, its president, personally is so manifest that no necessity existed for such proof. The proof was, therefore, improperly admitted. This error, however, was harmless, because the finding of the court that the signature was the corporate signature of the Badge Company must have been the same, if the proof had not been offered.

The legal principle involved in the fifth contention is not available to plaintiff in error in this case. The full and complete authority of Smith as president of the corporation is admitted. That is, it is admitted that he was the duly elected, qualified and acting president of the corporation fully empowered to do and perform all acts a president of that corporation could perform, and that is all the authority he assumed to have. The proposition contended for relates to cases where the agent, as such, has assumed authority he did not have. In the case at bar, the rights of the parties depend on the power of the corporation, not the authority of the agent. An agent duly authorized to act for the corporation in all things the corporation may lawfully do, and who discloses for whom he is acting, does not make himself personally liable by entering into a contract for the corporation which was ultra vires the corporation, when the person who attempts to enforce that contract knew at the time it was made and at the time he became financially interested in it that it was a contract the corporation could not lawfully make.

Plaintiff in error having failed to prove by a preponderance of the evidence that defendant in error, Smith, personally endorsed the note, and that the endorsement "American Badge Company, Frank A. Smith, Pres." was the authorized endorsement of that company, both of which endorsements are properly put in issue, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

The legal principle involved in the fifth contention is not available to plaintiff in view of this case. The fact and complete authority of said defendant is not in question is admitted. That is, it is admitted that he was the duly elected, qualified and acting president of the corporation fully empowered to do and receive all acts and transactions of that corporation until further notice, and that in all the evidence he is shown to have. The proposition concerning the relation to cases where the agent, as such, has assumed authority on his own part. In the case at bar, the rights of the parties depend on the power of the corporation, not the authority of the agent. An agent only authorized to act for the corporation in all things the corporation may lawfully do, and who disclaims for whom he is acting, does not make himself personally liable by entering into a contract for the corporation which was with the corporation, when the person who attempts to enforce such contract knew at the time it was made and at the time he became financially interested in it that it was a contract of the corporation and not individually.

Plaintiff in view having failed to prove by a preponderance of the evidence that defendant is guilty, said defendant is entitled to the verdict, and this the defendant's attorney has shown. From A. Smith, Jr. and the defendant's attorney of that company, both of which are defendants are hereby put in issue, the judgment of the court is affirmed.

-2896

-17701

171 - 17701.

182/391

M. FRIEDLANDER,
 Plaintiff in Error,)
 vs.)
 I. V. EDGERTON,
 Defendant in Error.)

ERROR TO
 MUNICIPAL COURT
 OF CHICAGO.

MR. PRESIDING JUSTICE GRAVES
 DELIVERED THE OPINION OF THE COURT.

This case comes here by writ of error to the Municipal Court. The abstract of the record contains no suggestion of any judgment in that court, and is in other respects informal and insufficient. All there is in this so-called abstract, except what is intended as an abstract of agreed facts, is as follows:

- "3 Praecipe and statement of claim.
- 5 Summons.
- 6 Appearance of defendant.
- 8 Affidavit of merits of defendant.
- 9 Bill of particulars for defendant and set-off.
- 13 Statement of claim for defendant and plea of set-off.
- 18 Amended statement of claim of the defendant on his plea of set-off.
- 21 Finding of the court on defendant's claim of set-off, setting damages at \$35.72.
- 23 Correct statement of all facts appearing on the trial of the above entitled cause, and all other proceedings in said cause, and all the decisions of the court in said cause.
- 24 Stipulation as to agreed facts."

"40 Finding of Hon. Oscar M. Torrison, Judge, that the plaintiff in error is entitled to recover on his original claim \$506.93, and further finding that defendant is entitled to recover on his plea of set-off \$542.65, being an excess of \$35.72 over and above the amount found due plaintiff.

Motion of new trial

Overruling of the motion of new trial.

Exceptions by the attorney for the plaintiff in error.

Dated June 14th, 1911.

42 Writ of error dated 17th day of June, 1911, filed in the Municipal Court on the 19th day of June, 1911.

43 Certificate of clerk."

Besides failing to show any judgment, this abstract is little more than an index and is wholly insufficient.

It has been many times held by the Appellate and Supreme courts of this state that the abstract must show everything on which error is assigned, in order to warrant the reversal of a judgment; that a court of review will not go to the record to find a reason for the reversal of a judgment. Spain v. Thomas, 49 Ill. App., 249; Bishop v. Loewus, 63 Ill. App., 351; Stony Island Hotel Co. v. Johnson, 57 Ill. App., 608; Johnson v. Bantock, 38 Ill., 111; Allen v. Henn, 197 Ill., 486; Dorn v. Ross, 177 Ill., 225; Traeger v. Mutual B. & L. Assn., 189 Ill., 314; City Elec. Ry. Co. v. Jones, 161 Ill., 47; Gibler v. City of Mattoon, 167 Ill., 18; Mallers v. Crane Elevator Co., 57 Ill. App., 283; Kelleher v. Tisdale, 23 Ill., 354.

It goes without saying that a judgment can not be reversed until one exists. The abstract in this case failing to show a judgment, it will be presumed, as against plaintiff in error, that none was entered.

It is also well settled that courts of review will go to the record to find reasons for affirming a judgment. Amudson Printing Co. v. Empire Paper Co., 83 Ill. App., 440; City Elec. Ry. Co. v. Jones, 161 Ill., 47; Martin & Co. v. McMurray, 74 Ill. App., 44.

An examination of this record discloses not only a judgment for defendant in error for \$35.72, but also that it is in accord with the manifest rights of the parties.

The judgment of the Municipal Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

228 - 17762.

MARTIN GNATEK,
Plaintiff in Error,
vs.
CHICAGO RAILWAYS COMPANY, a
corporation,
Defendant in Error.

ERROR TO

SUPERIOR COURT,
COOK COUNTY.

182 I.A. 392

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

The declaration in this case charges that while the plaintiff was with all due care and caution driving a team hitched to a wagon across the street car tracks of the defendant at the junction of Milwaukee avenue and Noble street, the defendant by its servants so carelessly, negligently and wrongfully managed, operated and controlled its street car that through and by the negligence, carelessness and improper conduct of the defendant by its servants the car of the defendant struck the wagon of the plaintiff and he was injured. The jury found the defendant not guilty.

To entitle plaintiff to recover he was bound to prove not only that the defendant's servants were negligent and that he was injured, but also that he was at and immediately before the time of the injury in the exercise of due care for his own safety, or, in other words, that he was not injured because of his own negligence. If either of these propositions are not established by a preponderance of the evidence, the verdict of the jury is right.

The plaintiff himself testified that before he started to cross the street he saw a street car approaching the point where he was about to cross, and from 100 to 120 feet away, moving "very fast"; that he whipped the horses with the lines and they went faster, but the car collided

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The defendant in this case charges that this the
 plaintiff was with all the time and caution during a long
 period to a person known to the plaintiff and known to the
 defendant as the husband of the plaintiff's mother-in-law
 named, and defendant by its conduct as maliciously, will-
 fully and wrongfully caused, repeated and continued the
 injury and through and by the negligence, carelessness
 and improper conduct of the defendant of the plaintiff and
 of the defendant caused the injury to the plaintiff and
 he was injured. The jury found the defendant was negligent.
 To entitle plaintiff to recover he was bound to
 prove not only that the defendant's conduct was negligent
 but that he was injured, and also that he was damaged.
 It before the jury in the injury in the conduct of the wife
 for his own injury, in other words, that he was not in-
 jured because of his own negligence. It appears that
 the defendant was not satisfied by a representation of the
 witness, the verdict of the jury is clear.

The plaintiff himself testified that before he
 started to cross the street he saw a street car approaching
 the point where he was about to cross, and then he saw
 the car stop, saying "very fast"; that he stepped the wrong
 side the lines and fell down; that the car continued

with the wagon before it cleared the car track; that the wagon he was driving was a heavy wagon loaded with over two tons of meat; that while his horses were walking fast he could stop them in 10 feet, and that he was then 10 or 15 feet from the track. He did not attempt to stop the team, but did attempt to hurry them across the track. Other witnesses for plaintiff testified that the car approached the place of collision "very fast". The various witnesses for both sides place the distance the car was from the point where the collision occurred at the time plaintiff first started to cross the track variously from 50 or 80 feet to as high as approximately 200 feet. Under that state of facts it was for the jury to say whether the plaintiff was at and immediately before the collision in the exercise of due care and caution for his own safety, or, in other words, whether he, in attempting to cross the tracks when he did, acted as an ordinarily prudent person would have done under the same or similar circumstances. In the view we take of the case, it would be useless to discuss the evidence tending to show the injury and the negligence of the defendant's servants in charge of the car. Suffice it to say the fact of the collision and the injury to plaintiff is fully established, and we think the evidence in the record would be sufficient to support a finding that the servants of defendant in charge of the car were negligent. The verdict of the jury was evidently based on a finding that the plaintiff was guilty of contributory negligence, and we think the evidence above referred to is ample to support that verdict.

Complaint is made to the giving of the 15th, 18th, 21st, and 24th instructions, given for the defendant.

The 15th instruction is on the burden of proof and the preponderance of the evidence. It is a stock instruction

and the reason before it started the car back; that the
witness he was driving was a heavy wagon loaded with over two
tons of meat; that while his hands were on the wheel he could
not see in 10 feet, and that he was then 10 or 15 feet from
the truck. He did not attempt to stop the wagon, but his
object was to hurry them across the track. Other witnesses
the plaintiff testified that the car overtook the truck at
collision "very fast". The various witnesses for both sides
give the distance the car was from the point where the
collision occurred at the time plaintiff first noticed it
from the truck variously from 50 to 75 feet to be with in
approximately 100 feet. When that state of facts is
put the jury to see whether the plaintiff was at that distance
expected the collision in the opinion of the jury and whether
the car was going at a rapid rate, which he is
convinced is what the facts were he did, and he is
fully convinced there would have been under the same or
similar circumstances. In the view we take of the case,
it would be useless to discuss the evidence leading to show
the injury and the negligence of the defendant's witness
in charge of the car. It is to say the fact of the
collision and the injury to plaintiff is fully established,
and we think the evidence in the record will be sufficient
to support a finding that the negligence of defendant is shown
of the car was negligent. The matter of the jury was
entirely based on a finding that the plaintiff was guilty
of contributory negligence, and we think the evidence above
referred to is ample to support that finding.
Conceding it to be to the effect of the 1920, 1921,
1922, and 1923 instructions, given for the defendant.
The first instruction is on the basis of what the
the negligence of the witness. It is a clear instruction

frequently given and often approved. The instruction is criticised because of the use of the expression "Established his case", the contention being that those words are not equivalent to "establishing the issues essential to the maintenance of the action", - "establish the material issues", - or "prove the allegations of his declaration". A like objection was disposed of adversely to that contention in Chicago City Ry. Co. v. Nelson, 215 Ill., 436-443; and G. U. T. Co. v. Kee, 218 Ill., 9.

Instruction 18 told the jury, in effect, that if they believed from the evidence that the sole cause of the injury to the plaintiff was his own negligence in driving his team onto the track in front of the car, he could not recover. It is insisted that this instruction is erroneous, because it ignores the question of negligence on the part of the servants of defendant, as well as on the part of the plaintiff. This instruction is equivalent to saying, if the jury find that the servants of defendant were not negligent, the plaintiff could not recover.

Instruction No. 21 relates to the effect of contributory negligence and announces the law to be that, if the plaintiff was injured while and because he was not in the exercise of such care for his own safety as an ordinarily prudent and cautious person would exercise under the same circumstances, he could not recover.

Instruction No. 24 relates to the duties and liabilities of persons confronted by sudden and unexpected danger. All these instructions state the law with substantial accuracy and are not subject to the several criticisms made.

Finding no error in the record, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

frequently given and often approved. The instrument is
originated because of the use of the expression "Established
firm", the condition being that these words are not
essential to establishing the firmness essential to the
instrument of the action, - "Established the original firmness",
- or "prove the allegations of the instrument". A like
objection was proposed at a meeting to limit condition in
Chicago City & Co. v. Chicago City & Co., 188-189; and S. W.
188-189, 189-190.

Instruction is given the jury, in effect, that if
they believe from the evidence that the sale of the
right to the plaintiff was his own negligence in selling his
right to the third party, he would not recover.
It is stated that this instruction is erroneous, because it
raises the question of negligence on the part of the plaintiff.
It is stated, as well as on the part of the plaintiff. This
instruction is equivalent to saying, if the jury find that
the evidence of defendant was not negligent, the plaintiff
will not recover.

Instruction No. 32 relates to the effect of contrib-
utory negligence and announces the law to be that, if the
plaintiff was injured while not because he was not in the
exercise of such care for his own safety as an ordinarily
prudent man would exercise under the same
circumstances, he shall not recover.

Instruction No. 33 relates to the action for the
violation of a contract by which the plaintiff was
All these instructions state the law with substantial accuracy
and are not subject to the several criticisms made.

Finding no error in the verdict, the judgment of the
Superior Court is affirmed.

361 - 17897.

JAMES I. JULIAN,
Appellee,

vs.

HENRY PIERSON and CHARLES B.
PIERSON,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

182 I.A. 400

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

Appellants were partners in the business of delivering newspapers to news dealers in different parts of the city. On March 22, 1909, one Richard Beynton, an employee of appellants in the capacity of a driver, was in the due course of their business passing north on Fifth avenue with one of their delivery wagons. A short distance north of Washington street the rig he was driving collided with, knocked down and ran over appellee, injuring him. A trial in the Superior Court resulted in a verdict and judgment for appellee for \$600.

Appellants ask a reversal of this judgment, because the court refused to direct a verdict of not guilty; because the verdict is contrary to the weight of the evidence on the question of the negligence of appellants and on the question of the contributory negligence of appellee, and because the court erred in modifying, refusing and giving instructions, and in rulings on the admission of evidence.

A peremptory instruction for the defendant should never be given where there is evidence in the record which, when considered by itself, fairly tends to establish the plaintiff's right to recover, as alleged in his declaration. Libby, McNeil & Libby v. Cook, 222 Ill., 306. The substance of the charge made in the declaration is that appellants, through their servants, so negligently and carelessly drove and managed the horse and wagon that the same ran against and

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over appellee and injured him, while he was in the exercise of due care and caution for his safety. The testimony of appellee tended to show that, as he was attempting to cross Fifth avenue from west to east, about 75 feet north of Washington street, and when he had crossed to within three or four feet of the east curb of the street, he was struck and knocked down by the rig of appellants as it came from the direction of Washington street; that before he attempted to cross, he looked across and up and down the street and saw nothing to hinder him from crossing in safety, and did not see the rig that struck him, until the instant before he was knocked down by it; that it was not dark; and that there was no street car or wagon on the street between him and Washington street. Watson, a policeman, at that time stationed at the crossing of Fifth avenue and Washington street, testified that he saw the rig as it approached Washington street from the south, and as it proceeded north therefrom; that it was going fast; on a trot and on a run. Other evidence in the record also tended to show that the horse was being driven at an immoderate speed. This evidence, taken by itself, tended to show due care on the part of appellee and negligence on the part of the servant of appellants, and the peremptory instruction was properly denied.

Whether the verdict is contrary to the manifest weight of all the evidence is a more difficult question. Some of the evidence offered by appellee, and above referred to, is contradicted flatly. The driver for appellants, Boynton, testified that the horse was not on a run, but was trotting, when appellee was struck. He also testified that appellee crossed the street in front of a car, and that he did not see him until he was right in front of the horse. There are some significant statements made by this witness that tend to weaken his evidence. He was asked on cross ex-

over applied and injured him, while he was in the exercise of due care and caution for his safety. The testimony of witnesses tended to show that, as he was attempting to cross

with arms from east to west, about 15 feet north of

Washington street, and when he had crossed to within about 10

feet east of the east end of the street, he was struck and

knocked down by the rig of defendant as it came from the

direction of Washington street; that before he attempted to

rise, he looked across and up and down the street and saw

nothing to hinder him from crossing in safety, and did not

see the rig until struck him, until the instant before he was

knocked down by it; that it was not dark; and that there was

no other car or wagon on the street between him and defendant

street. Nelson, a policeman, at that time stationed at the

corner of 15th street and Washington street, testified

that he saw the rig as it approached Washington street from

the south, and as it proceeded north in the street; that it was

going east; on a track and on a car. Other evidence in the

record also tended to show that the horse was being driven at

an excessive speed. This evidence, taken by itself, tended

to show the care on the part of appellee and negligence on

the part of the servant of appellee, and the probability

that appellee was properly warned.

Whether the verdict is contrary to the evidence

appears of all the evidence is a mere trifling question.

None of the evidence obtained by appellee, and above referred

to, is controverted fairly. The driver the appellee,

however, testified that the horse was not on a track, but was

driving, when appellee was struck. He also testified that

appellee crossed the street in front of a car, and that he

did not see him until he was right in front of the horse.

There are some trifling statements made by this witness

that tend to weaken his statement. He was asked on cross ex-

amination: "You did not see Mr. Julian until he was in front of the horse. Is that what you say?" and he replied, "Yes, I say I did not see him until he got near to the car." He further stated, "I grabbed my lines and held the horse at the time I first saw him. Nearly threw the horse down. I pulled him clear over on the side toward the elevated post and he nearly fell". He further stated, "When he got across, clear across, just hesitated enough so I could not stop". From these statements, taken in connection with the undisputed facts that appellee crossed Fifth avenue from the west to the east, and that the witness was driving the rig north on the east side of Fifth avenue, and that, notwithstanding the driver's frantic efforts to stop the horse after he "grabbed the lines", the rig went ten or fifteen feet past appellee after knocking him down, the jury might well have believed the rig was going at a recklessly immoderate speed; that the driver did not have hold of the lines until the instant before the collision and that he saw appellee in time, so that, if he had had hold of the lines, or had "grabbed" them sooner, he could have avoided the injury. Taking the statements of the driver above referred to as true, between the time the driver first saw appellee, when he "got near to the car", until he had passed "clear over" to the east side of the street, where he was struck, he had traversed more than one-half of the width of the street. Whether under all the facts disclosed by the evidence the acts of the driver were negligent, and whether appellee at and just before the time of the injury acted as an ordinarily prudent and cautious man, would have acted under the same or similar circumstances, were questions for the jury and after a careful consideration of all the evidence in the record, we are not prepared to say the finding of the jury on either of these questions was contrary to the weight of the evidence.

examination: "You did not see Mr. Tolson until he was in front
 of the horse. In that what you saw?" and he replied, "Yes,
 I did not see him until he got near to the car." He
 further stated, "I happened by lines and held the horse at the
 time I first saw him. Shortly after the horse came. I pulled
 his head over on the side toward the elevated track and he
 went off." He further stated, "When he got near,
 I saw him, just as he was enough so I could see him."
 From these statements, taken in connection with the statements
 made by Tolson's brother, it is apparent that the car was on the
 track, and that the witness was driving the rig south on the
 track, and that the witness, and that the witness, and that
 Tolson's brother's statement is that the car was either in "between
 the lines", the rig was on or between the lines, and that
 after examining the case, the jury might well have believed
 that the rig was going at a reasonably moderate speed; that the
 driver did not have hold of the lines until the instant before
 the collision and that he was operating in line, as that, if
 he had had hold of the lines, he would have "grabbed" the reins,
 he could have avoided the injury. Taking the statements
 of the driver above referred to as true, between the time
 the driver first saw Tolson, when he "got near to the car",
 until he had passed "close over" to the east side of the street,
 where he was struck, he had advanced more than one-half of
 the width of the street. Whether under all the facts and
 circumstances the acts of the driver were negligent,
 and whether negligent or not, just before the time of the injury
 acted as an ordinarily prudent and ordinary man would have
 acted under the same or similar circumstances, were questions
 for the jury and after a careful consideration of all the
 evidence in the record, we are not prepared to say that finding
 of the jury on either of these questions was arbitrary or the
 result of the evidence.

Several instructions asked by appellants, referring to acts that contributed to the injury, were modified by the court by inserting before the word "contributed" the word "proximately". It is insisted that proximately is a technical word, and that it was error to insert it in an instruction without defining it. Whether or not that is true appellants can not complain of its use in this case, because in an instruction asked by them, and given by the court as asked, the term "approximately contributed" is used. While in the abstract there may be a shade of difference in the terms, the International Dictionary gives each word as one of the definitions of the other, and as used in these instructions, they are synonymous. If the use of the term without a definition of it was error, it was one appellants led the court into, and they cannot now complain that it followed their lead.

One instruction, as requested by appellants, contained the expression, "If the accident was caused either wholly or in part by want of reasonable care or attention to his situation, on the part of the plaintiff*****". The court modified it by erasing the words, "or attention to his situation". This modification did not alter the meaning of the instruction to the detriment of appellants, and was not error.

An instruction dealing with the duty of the jury not to disregard the testimony of an unimpeached witness simply because he was or had been in the employ of appellants was refused, and appellants insist they were prejudiced, because one Martin was a witness for them and was not at the time of the trial in their employ, and that no other instruction specifically related to a case where a witness had been, but was no longer employed by a party. The distinction sought to be made between this refused instruction and some that were

given is too fine to be seen with the naked eye, even if the witness Martin had ever been in appellants' employ. A search of the record, however, discloses no evidence that he ever was an employee of appellants, but does disclose affirmatively that he was, at the time of the occurrences about which he testified, in the employ of the William J. Burns detective agency, which was not a party to the suit or shown to have been interested in any way in the result thereof. The complaint made to the refusal of this instruction is, therefore, without foundation.

When the policeman, Mateon, was on the stand as a witness for appellee, he was asked to relate a conversation had with the driver, Boynton, soon after the accident, and while he was still at the place where it occurred. Appellants objected on the ground that what the driver said after the occurrence was no part of the transaction. This objection the court sustained. Later, when Boynton was on the stand, appellants asked for and Boynton testified to part of the conversation in question. On cross examination he was asked for and told, without objection being made, more of the same conversation, and, among other things, that he had told the officer he was in a hurry. Later, the officer was recalled and, over objection, was allowed to give his version of the conversation. This conversation was no part of the transaction and did not purport to be, nor did it relate to it. It had reference solely to the desire of the driver to proceed on his journey after the accident, and had no reference to the accident or how or why it occurred. It should have been excluded. The evident purpose in introducing it was to create the inference that the driver was driving fast, and that was all the jury could have understood from it. While it was improperly admitted, there are two reasons why it could not have influenced the jury in determining the issues in the case.

given in the time to be seen with the naked eye, even if the witness Martin had been in witness' capacity. A counsel at the stand, however, claimed no evidence that he ever was an officer of applicants, and does likewise affirmatively that he was, at the time of the occurrence upon which he testified, in the employ of the William J. Burns Detective Agency, which was not a party to the suit or shown to have been interested in any way in the travel involved. The standing claim to the release of this investigation is, therefore, without foundation.

When the policeman, Martin, was on the stand in a witness' capacity, he was asked to relate a conversation had with the driver, Hyatt, upon which the suit was based. It was said that the driver had said that the defendant was the person who had the driver said that the defendant was no part of the transaction. This objection was sustained. Later, when Hyatt was on the stand, the same question was asked him and Hyatt testified in part of the conversation in question. On cross examination he was asked to say that, without objection being made, none of the time was spent, and, among other things, that he had told the driver he was in a hurry. Later, the driver was recalled, and, over objection, was allowed to give his version of the conversation. This conversation was no part of the conversation and his testimony to be, and his testimony to be, had reference solely to the driver to the driver to the driver after the accident, and had no reference to the accident or how or why it occurred. It should have been excluded. The evident purpose in introducing it was to create the inference that the driver was driving fast, and that was all the jury could have understood from it. While it was improperly admitted, there are two reasons why it should not have influenced the jury in determining the issues in the case.

First, the driver had already frankly testified without objection that he told the officer, after the accident had happened, that he was in a hurry, and, second, the evidence, aside from any inference to be drawn from the fact that he was in a hurry after the accident was over, was such that the jury must have found that Beynton was driving rapidly at and just before the time the accident occurred.

Finding no reversible error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

October Term, 1911, No.]

393 - 17930.

JOHN F. DEVINE, administrator of the
estate of JACOB ADELMAN, deceased,
Appellant,

vs.

THE SOUTH PARK COMMISSIONERS, a
corporation,
Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

182 I.A. 402

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

Appellant brought suit in the Superior Court of Cook County to recover from appellee damages for the death of appellant's intestate. The action was based upon the alleged negligence of appellee in maintaining a swimming tank or pool in Palmer Park, which is a south side park under the jurisdiction of appellee. A demurrer filed by appellee to the declaration was sustained and judgment was entered against appellant in bar of his action.

The question presented here for determination is whether appellee, The South Park Commissioners, as a corporate body, is liable for negligence in connection with the administration of its powers and duties.

It is conceded by appellant that, if the case of Backer v. The West Chicago Park Commissioners, 66 Ill. App., 507, was correctly decided, then the judgment in this case should be affirmed. In that case it was held that it was the state acting through the Park Commissioners that maintained the parks, boulevards and pleasure grounds; that the Park Commissioners have no voice in or control over what shall be done, or who shall be employed to do it, and that however remiss or negligent the commissioners may be, so that damage or injury to individuals results, no action can be maintained against the Park Commissioners as a corporate body therefor.

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1821.A.402

THE STATE OF NEW YORK
 COUNTY OF ALBANY
 JAMES A. JONES, Plaintiff
 vs.
 THE STATE OF NEW YORK, Defendant
 JAMES A. JONES, Plaintiff
 vs.
 THE STATE OF NEW YORK, Defendant
 JAMES A. JONES, Plaintiff
 vs.
 THE STATE OF NEW YORK, Defendant

Applicant brought suit in the Supreme Court of the State of New York to recover from the State of New York the sum of \$100,000.00, which is a sum of money which the State of New York owes to the Plaintiff. The Plaintiff claims that the State of New York owes him this sum of money because he has been in the service of the State of New York for a number of years and has been paid less than he should have been paid. The Plaintiff also claims that the State of New York has been negligent in its management of the State's finances and that this negligence has caused the State to owe him this sum of money. The Plaintiff seeks judgment for the sum of \$100,000.00, with interest and costs.

The question presented here for determination is whether the State of New York is liable to the Plaintiff for the sum of \$100,000.00. The Plaintiff claims that the State is liable because he has been in the service of the State for a number of years and has been paid less than he should have been paid. The Plaintiff also claims that the State has been negligent in its management of the State's finances and that this negligence has caused the State to owe him this sum of money. The Plaintiff seeks judgment for the sum of \$100,000.00, with interest and costs.

It is submitted by the Plaintiff that, in the case of State v. The New York State Employees' Union, 100-100000-100000, the Court held that the State is liable to its employees for the sum of \$100,000.00. The Plaintiff claims that the State is liable to him for the sum of \$100,000.00 because he has been in the service of the State for a number of years and has been paid less than he should have been paid. The Plaintiff also claims that the State has been negligent in its management of the State's finances and that this negligence has caused the State to owe him this sum of money. The Plaintiff seeks judgment for the sum of \$100,000.00, with interest and costs.

The court says:

"The West Chicago Park Commissioners is a municipal corporation, having certain limited powers granted to it by the legislature. The members of the Board of West Chicago Park Commissioners are agents, by whom, in part, the people of the State carry on the government. Their functions are essentially political and concern the State at large, although they are to be discharged within the town of West Chicago.***** Wilcox v. The People, 90 Ill. 186; West Chicago Park Commissioners v. McMullen, 134 Ill. 170."

In Brandt v. West Chicago Park Commissioners, 163 Ill. App., 371, the court, speaking of the Park Commissioners, said:

"Undoubtedly the appellee is a municipality of such limited powers and created in such a way as to render it immune from liability for damages resulting from the negligence of its officers." Citing Racker v. West Chicago Park Commissioners, supra.

In People ex rel. v. Walsh et al., 96 Ill., 232, the court says:

"That the Park Commissioners are a public corporation in whom is vested certain governmental powers of a political character is settled by the previous decisions of this court."

In Wilcox et al. v. People et al., 90 Ill., 186, the court says:

"The members of the board of West Chicago Park Commissioners are agents, by whom, in part, the people of the State carry on the government. Their functions are essentially political, and concern the state at large, although they are to be discharged within the Town of West Chicago."

Without elaborating on the reasoning of the court we conclude that the holding in Racker v. The West Chicago Park Commissioners, supra, is correct, and holds good in the case at bar.

The judgment of the Superior Court is, therefore, affirmed.

Judgment Affirmed.

The court says:

"The First Chicago Youth Commission is a municipal corporation, having created and received powers granted to it by the ordinance. The members of the board of First Chicago Youth Commission are elected, in part, by the people of the State and in part by the government. Their functions are essentially political and concern the State at large, although they are to be distinguished from those of First Chicago Youth Commission. The People, No. 111, 190; First Chicago Youth Commission v. Board of First Chicago Youth Commission, No. 111, 190."

In People v. First Chicago Youth Commission, No. 111,

190, 191, the court, speaking of the First Commission, says:

"Fundamentally the commission is a municipality of such character as to be treated in such a way as to be treated in the same manner as the government. Their functions are essentially political and concern the State at large, although they are to be distinguished from those of First Chicago Youth Commission. The People, No. 111, 190; First Chicago Youth Commission v. Board of First Chicago Youth Commission, No. 111, 190."

In People v. First Chicago Youth Commission, No. 111, 190,

The court says:

"That the First Commission is a public corporation is well established. It is a corporation created by the State and is treated in the same manner as the government. Their functions are essentially political and concern the State at large, although they are to be distinguished from those of First Chicago Youth Commission. The People, No. 111, 190; First Chicago Youth Commission v. Board of First Chicago Youth Commission, No. 111, 190."

In People v. First Chicago Youth Commission, No. 111, 190,

The court says:

"The members of the board of First Chicago Youth Commission are elected, in part, by the people of the State and in part by the government. Their functions are essentially political and concern the State at large, although they are to be distinguished from those of First Chicago Youth Commission. The People, No. 111, 190; First Chicago Youth Commission v. Board of First Chicago Youth Commission, No. 111, 190."

Without dissenting as the reasoning of the court

is affirmed that the holding in People v. First Chicago Youth Commission, No. 111, 190,

is correct, and holds good in the case

of First

The judgment of the Superior Court is affirmed.

affirmed.

First Chicago Youth Commission

70 - 18094.

JOSEPH STERN,
Defendant in Error,

vs.

SAMUEL WELENSKY and MORRIS GOLDBERG,
co-partners doing business as
WELENSKY & GOLDBERG,
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

182 I.A. 417

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error are partners in the business of conducting a bathing establishment in the City of Chicago. The office part of the business is conducted by the partners personally. The office proper is separated from the lobby or reception room by a partition, through which there is an opening in which is adjusted a metal screen or gate, at which opening the business between plaintiffs in error and their customers is transacted. The office is equipped with a case of safety boxes designed to be used for storing articles of value belonging to patrons. Each safety box is equipped with a removable tin box into which it is intended such valuables will be placed, the tin box then returned to the safety box, which in turn is then locked and the key is delivered to the bather whose valuables are so deposited. The keys to these boxes, that are regularly so used, are attached to elastic rings or bands designed to be slipped over the hand of the bather and to remain on his wrist all the time until returned to the office by him when he goes there to reclaim the articles deposited. These keys bear a number corresponding to the number on the safety box. Plaintiffs in error have other keys to these safety boxes which they keep in a safe in the office, and to which no elastic ring is attached. These keys are supposed to be used only when the

417

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with a removable tin box into which it is inserted and
the tin box then returned to the
safety box, which is then locked and the key is de-
livered to the person whose revolver is so deposited. The
keys to these boxes, that are regularly so used, are attached
to elastic rings or bands designed to be slipped over the
hand of the holder and to remain on his wrist all the time
until returned to the office by him when he has there to
reclaim the revolver deposited. These keys bear a number
corresponding to the number on the safety box. This
in a safe in the office, and to which no access is al-
lowed. These keys are supposed to be used only when the
in a safe in the office, and to which no access is al-
lowed. These keys are supposed to be used only when the

regular key is lost. The patron has no access to the safety boxes, and they are in the regular course of business unlocked only by those in charge of the office, and then only with the key presented by the customer on his return from his bath. Elsewhere in the establishment, dressing rooms are maintained, and in connection therewith, lockers are assigned to bathers, into which they place their clothing. These lockers are equipped with locks. A pass key that will open all these lockers is kept by an attendant. When the bather has finished his bath, he calls the attendant, who has the pass key, who then unlocks the locker. The customer then dresses, repairs to the office, turns in the key to his safety box, which is then unlocked by those in charge of the office, and the valuables there deposited are delivered to the customer.

Defendant in error became, on the day in question, a patron of the bathing establishment of plaintiffs in error. He was accompanied by a friend by the name of Davis. Together they approached the office of plaintiffs in error and through the opening in the partition procured and paid for two bath tickets from plaintiff in error, Samuel Welensky, one of the partners who was then in charge of the office, and who then informed defendant in error that the firm would not be responsible for any valuables lost, if the same were not left in the office for safe keeping. A sign containing the words, "Check your valuables at office" was conspicuous on the partition above mentioned. Defendant in error signified his desire to leave his valuables and money at the office as suggested. Welensky opened safety box No. 11, took therefrom the tin box above mentioned and the valuables of both defendant in error and his friend, Davis, were placed therein. The preponderance of the evidence tends to show that the money and property in question was delivered to Welensky to be put into the tin box and that the money was counted by him

regular pay is lost. The person has no means to the safety
fund, and they are in the regular course of business unlooked
for by those in charge of the office, and they only find the
pay presented by the president on his return from his trip.
Meanwhile in the establishment, business goes on as usual,
and in connection therewith, workers are required to perform
their work just like other workers. There is no
specialty with them. A few days after all these
troubles in fact by an accident. When the worker has finished
his work, he enters the apartment, and has the good day, and
finds that the worker, the president of the office, is
in the office, and in the box to his safety box, which is
then unlocked by those in charge of the office, and the
contents are deposited and delivered to the president.
Meanwhile in error account, on the day in question,
a portion of the morning establishment of the office is
to be represented by a letter by the name of Davis. The
day afterwards the office of the president is then and there
the president in the position concerned and paid for two days
before from his office in error, General Johnson, and by the
fact that he was then in charge of the office, and was then
in error, Johnson is then that the time would not be wrong
that he was not in error, at the same time not left in
the office for his health. A wife continued the work,
"Check your witnesses at office" and attendance on the
position after mentioned. Meanwhile in error office the
office is left by witnesses and money of the office is
presented. The money is then sent to the office, and the
time for the day is then and the witnesses are then
delivered in error and the office, and the office is then
the importance of the evidence found to show that the
money and property in question was delivered to Johnson by
be put into the box and that the money was returned by him

before it was deposited in the box, but this he denies. The tin box was then returned to the safety deposit box, that box was locked and a key purporting to be a key to it, which the preponderance of the evidence tends to show had no rubber ring attached, was delivered to defendant in error who placed it in the pocket of his trousers. He then, together with his friend, Davis, repaired to the dressing room, where separate lockers were assigned to them, and into which they placed their clothing, the clothing of defendant in error containing, among other things, the key to the safety box. After they had completed their bath they repaired to the dressing room and procured their lockers to be opened. Defendant in error then found that the key to the safety box in the office had disappeared from his clothing while he was bathing. He, together with his friend, Davis, then went to the office and after some delay found that the money and valuables he had deposited in the safety box had been removed therefrom, that the valuables of the witness, Davis, still remained in it, and that there was also in it a wallet containing a small amount of money, and a watch belonging to one Samuel E. Lamont of the firm of Ross & Lamont, tailors, of Savanna, Illinois, who then had the regular key to the box and was then taking his bath. While the testimony of Lamont was not taken, and no explanation is made by the proof of how he came by the regular key to the safety box, or how his valuables came to be in that box, no one seems to have had any suspicion that he had had anything to do with the disappearance of the money and valuables of defendant in error. While the parties to this suit and the witness, Davis, were still discussing the loss, Lamont, having finished his bath, came to the office, produced the regular key to the safety box, claimed and received his wallet and watch there deposited, and after leaving his business card, giving his name and address, departed.

The uncontroverted evidence establishes beyond controversy that defendant in error left in the tin box in the safety box \$177 in cash, a gold watch and chain and a gold locket with a diamond setting, and that the value of the personal property, exclusive of the cash, was approximately \$125. The preponderance of the evidence tends to show that defendant in error paid to plaintiffs in error 25 cents for the use of the safety box, exclusive of what was paid for the bath tickets. Suit was begun in the Municipal Court to recover for the money and property left in the safety box by defendant in error. Upon the trial the jury found the issues for defendant in error and assessed his damages at \$306. A remittitur of \$24 was filed by defendant in error and judgment was rendered for \$282 and for costs. The cause comes here for review on writ of error.

The transaction, shown by this record, constitutes a bailment of the money and valuables of defendant in error placed in the safety deposit box No. 11. When property is delivered into the hands of a bailee and can not be returned on demand, the law presumes negligence on the part of the bailee and imposes on him the burden either of showing that he has exercised such care over it as was required by the character of the bailment, or of paying the owner the value thereof. McCurrie v. Hines Lumber Co., 178 Ill. App., 417; Bryan v. C. & A. Ry. Co., 169 Ill. App., 181. If a bailee shows that property that is the subject of the bailment and which he is unable to return has been lost by some violence, theft or accident, the presumption of its loss, through his negligence, is overcome, and before the bailor can recover of the bailee the value of the same the burden is on him to prove that the loss was due to the want of due care on the part of the bailee. C., R. I. & P. Ry. Co. v. Kendall, 72 Ill. App., 105, (and authorities there cited).

The uncontroverted evidence established beyond doubt
that the defendant in error left in the tin box in the
attic of the house, a gold watch and chain and a gold
ring with a diamond setting, and that the value of the
contents of the box, exclusive of the cash, was approximately
\$100. The presumption of the evidence tends to show that
the defendant in error left the tin box in the attic for
the use of the party who was to be paid for the
work done. This was shown in the material part of the
evidence for the party who was to be paid for the
work done. When the trial was held the jury found the
defendant in error and assessed his damages at \$100. A
motion for judgment in error and assessed his damages at \$100.
The motion was denied. The court said that the
evidence for \$100 and for costs. The court said that
the motion was denied.
The defendant, when by this motion, submitted
a statement of the money and value of the defendant in error
placed in the safety deposit box No. 11. When the money is
returned into the hands of a party who can not be returned
to him, the law presumes negligence on the part of the party
who has the money and the burden of showing that he has
not is on him. The burden of showing that he has
not is on him. It is not required by the character
of the claim, or of giving the money the value thereof.
Roberts v. Hines, 100 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

There is no pretense that plaintiffs in error were prevented from returning the valuables because of any violence or accident. There is no proof in this record as to what became of the valuables, or as to how or by whom the same were removed from the safety box. The proof does show that no one but plaintiffs in error personally had access to the safety boxes. There is no proof that the key to the safety box that was missed from the clothing of defendant in error was ever presented to the office of plaintiffs in error, or that the valuables were obtained from plaintiffs in error by its use. It follows that there is no proof that these valuables were removed from the possession of plaintiffs in error by theft. Plaintiffs in error, having failed to overcome the presumption of negligence arising from the relation of bailor and bailee, and the failure to return the property bailed on demand, were liable for the value thereof, and the defendant in error was entitled to the verdict and judgment obtained.

A motion for a new trial was made by plaintiffs in error on the ground of newly discovered evidence tending to impeach defendant in error in his testimony as to where he obtained the money in question. A new trial will never be awarded for the sole purpose of impeaching a witness, even though that witness be a party, particularly where the testimony given by the witness relates to an immaterial matter.

W. C. R. R. Co. v. Ross, Admr., 142 Ill., 9; Sanis v. Horner et al., 185 Ill., 347; C. & E. I. R. R. Co. v. Stewart, 203 Ill., 223.

The evidence that defendant in error placed the money in the safety box being undisputed, it is wholly immaterial to the determination of this case where he got it, and proof that he had falsely stated that fact, while it might tend to discredit him as a witness, would not defeat his right to recover.

Newly discovered evidence in order to require the granting of a new trial must be of a conclusive character against the verdict returned. Monroe v. Snow et al., 131 Ill., 126.

Finding no error in the record, the judgment of the Municipal Court must be affirmed.

JUDGMENT AFFIRMED.

Early discovered evidence in order to establish the
existence of a new trial must be of a conclusive character
as in the case of People v. Jones, 1901, 100 N.Y. 100.

It is not sufficient to show that the evidence is
material and that it was not known by the jury at the time
of the trial.

THE COURT OF APPEALS.

March Term, 1912, No.
143 - 18174.

JAMES THANAPOULOS,
Plaintiff in Error,
vs.
TOM BOUMBOULOS,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

182 I.A. 424

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

This is an action of replevin tried in the Municipal Court without a jury. The property in question is a horse, wagon and harness. The finding and judgment of the court was for the defendant. Plaintiff bases his right to recover on the theory that he purchased the property of the defendant and is now the owner of it. No controverted questions of law are presented for determination. We are asked to reverse the judgment for the sole reason that the finding and judgment of the court are manifestly against the weight of the evidence. There is no question that the property originally belonged to the defendant. If it was the property of plaintiff at the time this suit was begun, it became so by purchase from the defendant. The evidence for the respective parties on this subject is flatly conflicting. The witnesses for the respective parties were about equal in number. Whether or not the plaintiff maintained his claim by a preponderance of the evidence turned almost entirely on the question of the veracity of the witnesses for the respective parties. The trial court had the advantage of seeing these several witnesses on the stand and of observing their manner while testifying and their apparent candor and fairness, or the lack of it, and of judging therefrom which of them were entitled to the most credit. This is an advantage that can scarcely be overestimated and one of which this court is in the nature of

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DELIVERED THE OPINION OF THE COURT.
MR. CHIEF JUSTICE GRANT.

[illegible]

things deprived.

If the trial court had believed the testimony offered for the plaintiff, there was ample to support a finding that he was the owner of the property in question. If he deemed the testimony of the defendant's witnesses as more, or even equally, worthy of belief, he could not hold that the plaintiff had maintained his case by a preponderance of the evidence. In this state of the record it would be a waste of time to discuss the evidence in detail. It is sufficient to say that after a careful consideration of all the evidence we are unable to give any reason for holding that the finding of the court is contrary to the manifest weight of the same.

The judgment of the Municipal Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

being received.

If the trial court had believed the testimony

offered for the defendant, there was nothing to prevent a
finding that he was the father of the plaintiff's child.
If he denied the testimony of the defendant's witness as
given, on cross-examination, he would not have
that the plaintiff had introduced his case by a preponderance
of the evidence. In his state of mind he would be a
man of straw to whom the evidence in detail. It is
sufficient to say that after a careful consideration of all
the evidence we are unable to give any reason for holding
that the finding of the court is contrary to the weight
of the evidence.

The judgment of the District Court is affirmed.

Witness.

JOHN T. HENRY

88 * 17607.

182 I.A. 425

MARGARET NOACK,
Defendant in Error,

ERROR TO

vs.

MUNICIPAL COURT

RUDOLPH WOSSLICK,
Plaintiff in Error.

OF CHICAGO.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

Margaret Noack recovered a verdict and judgment against Rudolph Wosslick in the Municipal Court for \$275 as damages for personal injuries alleged to have been occasioned by the negligence of the latter, who here prosecutes this writ of error.

On June 14, 1910, and for about six months prior thereto the plaintiff in error operated and managed a restaurant and summer garden at the northeast corner of Halsted and Addison streets in the City of Chicago. The premises had a frontage of 150 feet on Halsted street on the west and of 175 feet on Addison street on the south. There was an "L" shaped building on the southwest corner of the premises which had a frontage of 115 feet on Halsted street and 140 feet on Addison street. The portion of the building fronting on Halsted street had a depth of thirty feet, and the portion of the building fronting on Addison street had a depth of 40 feet. On the north side of the portion of the building fronting on Addison street was a porch 8 feet in width extended to within 7½ or 8 feet of the east end of the building. Extending from the easterly end of said porch to the easterly end of the building was a wooden platform in which there was a trap-door which opened to the south against the wall of the building, and beneath the trap-door was a

1821.A.425

EXHIBIT TO
MUNICIPAL COURT
OF CHICAGO.

RECOUNT BOOK
Containing in brief
vs.
RECOUNT BOOK
Plaintiff in error.

MR. JUSTICE HARRIS DELIVERED THE OPINION OF THE COURT.

Margaret Howell recovered a verdict and judgment against the defendant in the Municipal Court for \$500 in damages for personal injuries alleged to have been occasioned by the negligence of the latter, who here prosecutes this writ of error.

On June 14, 1910, and for about six months prior thereto the plaintiff in error occupied and retained a vacant and summer garden at the northeast corner of Madison and Addison streets in the City of Chicago. The garden had a frontage of 150 feet on Madison street on the east end of 175 feet on Addison street on the south. There was an "L" shaped building on the southwest corner of the garden which had a frontage of 115 feet on Madison street and 120 feet on Addison street. The portion of the building fronting on Madison street had a depth of thirty feet, and the portion of the building fronting on Addison street had a depth of 40 feet. On the north side of the portion of the building fronting on Addison street was a porch 8 feet in width extended no more than 7 or 8 feet at the east end of the building. Extending from the easterly end of said porch to the easterly end of the building was a wooden platform in which there was a trap-door which opened to the south against the wall of the building, and beneath the trap-door was a

stairway and a cellar about 5 feet in depth. There was an entrance to the premises upon each of the streets named. At the east end of the open garden space was a stage from which moving pictures were displayed and the remainder of the open garden space was provided with chairs and tables for the accommodation and use of the patrons. On the evening of June 14, 1910, defendant in error, in company with her husband and three or four other parties, went to the place of business of plaintiff in error, where all occupied seats at a table in the garden space not far from the stage. Prior to the occupancy of the premises by plaintiff in error, when they were used for the same purpose, a women's retiring room was located in the northeast corner of the building at or near the place where the platform and trap-door above described were located at the time in question, and defendant in error was familiar with the former location of said room and with the means of access thereto. At the time in question the women's retiring room was located at the west end of the porch above described, where there were placed an appropriate sign and some electric lights. At about half past 8 or 9 o'clock defendant in error had occasion to go to the women's retiring room, and assuming that it was still located at the northeast corner of the building, she went to the platform at the place indicated. The trap-door was then open and as defendant in error stepped from the ground to the platform her foot went into the opening and she was precipitated into the cellar and injured. Defendant in error testified that she had no knowledge that the women's retiring room had been removed to the west end of the porch, and as to this she is not contradicted. She further testified that as she approached the platform she observed a light in the portion of the building at that place which she thought was visible

stairway and a collar about 3 feet in length. There was an entrance to the premises upon each of the streets named. At the east end of the open garden space was a stage from which moving pictures were displayed and the remainder of the open

garden space was provided with chairs and tables for the

consumption and use of the patrons. On the evening of

June 14, 1910, defendant in error, in company with her husband and three or four other persons, went to the place of

business of plaintiff in error, where all occupying seats at a table in the garden space not far from the stage. Prior

to the occupancy of the premises by plaintiff in error, when that time used for the same purpose, a woman's retiring room was located in the northeast corner of the building at or

near the place where the plaintiff and defendant above described were located at the time in question, and defendant

in error was familiar with the former location of said room

and with the name of persons therein. At the time in question the woman's retiring room was located at the west end of the porch above described, where there was placed an open

plaster sign and some electric lights. At about half past

9 or 9 o'clock defendant in error had occasion to go to the

woman's retiring room, and avers that it was still located at the northeast corner of the building, and went to the place

where at the place indicated. The two doors were then open

and as defendant in error stepped from the porch to the place

where her foot went into the opening and she was precipitated

into the street and injured. Defendant in error testified that she had no recollection that the woman's retiring room was

then removed to the west end of the porch, and as she said this is not contradicted. She further testified that on the

afternoon the plaintiff and defendant above described were visible at the building at that place which the woman's was visible

through a transom over the door or through a window. As to the presence of a light in that portion of the building, the evidence is conflicting, but it is well established by the evidence that there were no lights at or near the eastern end of the garden space, as the presence of lights there would have prevented a view of the moving pictures. The arrangement of the porch extending west from the platform is not definitely described, but some portion of that porch is referred to as having been used as a summer bar. Whether it was so used at the time in question does not appear. The cellar to which access was had by the trap-door was formerly used for storing beer barrels, but was not then being used for any purpose. The trap-door was not locked or otherwise securely fastened and was located where it might be readily opened by any one moved by mischief or idle curiosity. The evidence given in behalf of plaintiff in error tends to show that the premises were frequently invaded by boys, and that plaintiff in error and others in his employ were occupied much of the time in chasing boys out of the grounds and buildings; that plaintiff in error and others in his employ had frequent occasion to observe the portion of the premises where the platform and trap-door were located, and that they did not open the trap-door or observe that it was open prior to the time defendant in error was injured.

It is insisted that the verdict is not supported by the evidence and is contrary to law.

The status of defendant in error was not that of a trespasser or a licensee merely, but was clearly that of an invitee, as to whom plaintiff in error was bound to exercise reasonable care to make and keep the premises in a reasonably safe condition for her proper use of the same, while she was in the exercise of reasonable care for her own safety.

through a screen over the door or through a window. As to
the presence of a light in that portion of the building, the
evidence is conflicting, but it is well established by the
evidence that there were no lights at or near the eastern end
of the ground upon which the presence of lights there would
have presented a view of the moving picture. The evidence
and of the ground extending west from the building is not
entirely harmonious, but some portion of that ground is
retained so as having been used as a screen for the
is not used at the time in question does not appear. The
evidence to which account was had by the first-hand and directly
used the screen door visible, but was not then being used
the eye witness. The first-hand was not located on either
evidence located and was located where it might be readily
evidence of any one other of which is not available. The
evidence given in behalf of plaintiff in other cases on such
fact and evidence were frequently invoked by both, and that
plaintiff in error and others in his early years occupied
most of the time in chasing boys out of the grounds and
evidence; that plaintiff is aware and others in his vicinity
and frequent occasion to observe the position of the picture
where the picture and first-hand were located, and that they
did not open the first-hand or observe that it was open prior
to the time defendant is alive was located.
It is insisted that the verdict is not supported by
the evidence and is contrary to law.
The status of defendant in error was not that of a
possessor of a license merely, but was clearly that of an
invitee, as to whom plaintiff in error was bound to exercise
reasonable care to warn and keep the premises in a reasonably
safe condition for his proper use at the time, while the same
in the exercise of reasonable care for her safety.

The argument advanced by plaintiff in error in support of his contention that there is no sufficient proof of negligence wholly overlooks the failure of plaintiff in error to lock or otherwise securely fasten the trap-door or to provide a guard at the platform as an essential element, in view of the existing situation, in determining the question of negligence. The area occupied by the garden space proper to the west and in front of the stage, was comparatively small, being about 67 x 110 feet. Most, if not all, of this space was occupied by chairs and tables. There were no well defined paths or walks upon which the patron were expected to move about. The easterly portion of the space near the stage was not provided with artificial lights and was comparatively dark. The platform in which the trap-door was placed immediately adjoined the garden space and was open and readily accessible by persons on foot. Plaintiff in error and others employed by him had frequently chased away boys who had congregated at and upon the platform.

In view of the entire situation, as above stated, it can not be said as a matter of law that the failure of plaintiff in error to lock or otherwise fasten the trap-door or to provide some barrier or guard around the platform did not constitute negligence, or, in other words, did not amount to a failure on the part of plaintiff in error to exercise reasonable care to make and keep the premises reasonably safe for his patrons, and we are not prepared to say, as a matter of fact upon the evidence adduced, that plaintiff in error was not guilty of negligence in that respect. As bearing upon the question whether or not defendant in error was in the exercise of reasonable care for her own safety, the fact that the women's retiring room was formerly located in the north-east corner of the building, and the further fact that defendant in error relied upon her knowledge of its former location

The argument advanced by Plaintiff is that in
any event at his position this time he is not negligent
at negligence wholly overlooking the failure of Plaintiff to
error in fact in relation to the same.
In providing a hand at the position as an assistant agent,
Plaintiff of the existing situation, in determining the question
of negligence. The area occupied by the agent upon proper
for the work and in front of the agent, was comparatively
small, being about 25 x 100 feet. It was all, of this
area was occupied by chairs and tables. There were no
well defined paths or walls upon which one person was ex-
pected to move about. The seating position of the agent
was the same was not provided with artificial lights and
the arrangement was such. The position in which the first-
mentioned defendant occupied the position upon the
ground and fully accessible by persons on foot. Plaintiff
is cited and others employed by him and frequently caused
very boys who had congregated at and upon the platform.
In view of the entire situation, as above stated,
it can not be said as a matter of fact that the failure of
Plaintiff in error in lack of knowledge between the first-
mentioned agent and Plaintiff or that between the Plaintiff and
the various persons, or, in other words, did not amount
to negligence. In view of the fact of Plaintiff in error in negligence
Plaintiff's case to make and keep the premises reasonably safe
for his persons, and we are not prepared to say, as a matter
of fact upon the evidence shown, that Plaintiff in error was
not guilty of negligence in that respect. As bearing upon
the question whether or not defendant in error was in the
possession of knowledge and for her own safety, the fact that
the woman's testimony was largely founded in the words
and testimony of the building, and the further fact that when
that in error relied upon her knowledge of the former situation

are not without significance.

The cases principally relied upon by plaintiff in error are not in point. In Cowan v. Kirby, 180 Mass., 304, Bennett v. Butterfield, 112 Mich., 96, and Davis v. Ringolaki, 143 Mo. App., 364, the plaintiffs were mere licensees. The evidence required the submission of the questions involved to a jury and we are not persuaded that the verdict was unwarranted.

If the uncontradicted testimony of defendant in error and her attending physician is true, the damages are not so excessive as to require a remittitur or a reversal of the judgment by a court of review.

Upon his direct examination defendant was asked: "Whom did you see the next morning?" He replied: "It was a lawyer; her husband came with a lawyer and introduced him." The following then appears in the record:

"Objection to anything the lawyer or husband might have said; objection sustained."

It is now insisted that the court improperly refused to permit plaintiff in error to testify to the conversation he then had with the husband of plaintiff and the lawyer who accompanied him. The question sought to be raised is not properly preserved for review. Plaintiff in error was not asked to state what was then said, and it was not made to appear to the court that what was then said, if anything, was relevant or competent.

A consideration of the entire testimony of the witness, Russell, discloses that plaintiff was not harmed by the action of the court in sustaining an objection to a question relative to the length of time which elapsed between the time the witness saw the trap door and the time he learned of the accident.

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• **RESEARCH** •

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THE UNIVERSITY OF CHICAGO

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...and the

Page 11 : 11/11/11 : 11/11/11

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100-443886-11

REF ID: A66084

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off to hospital on credit with two weeks' rest and another week

Both of the parties to the suit are natural persons and both testified as witnesses, and the second instruction tendered by plaintiff in error was, therefore, properly refused. Klick v. Woost, 145 Ill. App., 411; C. & E. I. R. R. Co. v. Burridge, 211 Ill., 2.

The jury were charged that it was the duty of plaintiff in error to exercise ordinary care to preserve and keep his place in a reasonably safe condition for his patrons and visitors. It is said that the duty imposed by law upon plaintiff in error in that respect was limited to patrons of his place and did not extend to visitors. If it be conceded that by the term "visitors" was meant licensees merely, the charge could not have harmed plaintiff in error, because, as heretofore held, defendant in error was an invitee and not a licensee.

There is no substantial error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

Both of the parties to the suit are natural persons
and both testified as witnesses, and the second investigation
conducted by the court in 1900 was, therefore, properly
conducted. Black v. White, 100 Ill. 2d 111, 211; 212 Ill. 2d 111, 211.

The jury were charged that it was the duty of plain-
tiff to enter the premises only once to protect and keep
the place in a reasonably safe condition for his persons and
property. It is said that the duty imposed by the law
of negligence is not in that respect was limited to persons of
his place and did not extend to visitors. If it be conceded
that the term "visitors" was meant to include every one
who might not have been invited to enter, however, as
plaintiff said, defendant in 1900 was an invitee and not a
visitor.

There was no objection to the second and the
evidence is sufficient.

REVEREND JUDGE.

235 - 17768.

182 I.A. 429

BRIDGET McDONALD;
Appellee,

vs.

PETER E. MODINE et al.,
Defendants,
PETER E. MODINE,
Appellant.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

Bridget McDonald brought her action in case in the Superior Court against P. E. Modine and Olney & Jerman Company, a corporation, to recover damages for personal injuries, and upon the trial before a jury there was a directed verdict of not guilty in favor of the defendant corporation. The jury returned a verdict against the defendant, Modine, for \$1,200, upon which verdict a judgment was entered, and Modine prosecutes this appeal to reverse such judgment.

The declaration, upon which the cause was submitted to the jury, contains four counts. The first count charges that on July 26, 1909, the defendants possessed and controlled a horse and wagon, which, by a servant under their joint control, were being driven south on State Street, at its intersection with Madison street in the City of Chicago, Illinois; that said intersection is one of the most used and crowded crossings, being situated in the shopping district of the city; that the streets at the intersection were used by 200,000 pedestrians, many diverse vehicles, and street cars, each day; that while plaintiff was crossing State street at or near its intersection with Madison street, and exercising ordinary care, defendants, by their servants, so carelessly, negligently and wrongfully drove, managed and controlled a horse and wagon, that they ran against and upon plaintiff, injuring her, etc.

1821.A.128

IN THE
COURT OF THE COMMON PLEAS
FOR THE COUNTY OF COLUMBIA

JOHN A. MOHR,
Plaintiff,
vs.
JOHN A. MOHR,
Defendant.

THE COURT OF THE COMMON PLEAS FOR THE COUNTY OF COLUMBIA

DOES hereby certify that the following is a true and correct copy of the

original of the same as the same was filed in the

office of the Clerk of the Court of the Common Pleas for the County of Columbia

on the 10th day of May, 1938, at the City of Columbia, Missouri.

Witness my hand and the seal of the Court at the City of Columbia, Missouri,

this 10th day of May, 1938.

JOHN A. MOHR, Plaintiff.

JOHN A. MOHR, Defendant.

The Court of the Common Pleas for the County of Columbia

DOES hereby certify that the following is a true and correct copy of the

original of the same as the same was filed in the

office of the Clerk of the Court of the Common Pleas for the County of Columbia

on the 10th day of May, 1938, at the City of Columbia, Missouri.

Witness my hand and the seal of the Court at the City of Columbia, Missouri,

this 10th day of May, 1938.

JOHN A. MOHR, Plaintiff.

JOHN A. MOHR, Defendant.

The Court of the Common Pleas for the County of Columbia

DOES hereby certify that the following is a true and correct copy of the

original of the same as the same was filed in the

office of the Clerk of the Court of the Common Pleas for the County of Columbia

on the 10th day of May, 1938, at the City of Columbia, Missouri.

Witness my hand and the seal of the Court at the City of Columbia, Missouri,

this 10th day of May, 1938.

The second count charges that while plaintiff was endeavoring to board a street car running on State street, which was stopping for her to board, defendants failed to keep a lookout and failed to watch where the horse and wagon was being driven; that as a result thereof, they ran against plaintiff, injuring her, etc.

The third count charges that while plaintiff was endeavoring to board a street car, on State street, which was stopping for her, defendants negligently drove the horse and wagon at a high rate of speed, injuring her, etc.

The fourth count charges that defendant Modine was a teaming contractor and owned numerous horses and wagons which he employed in delivering goods for various concerns under contract; that defendant, Olney & Jerman Company, was engaged in the wholesale drug business, and had contracted with defendant, Modine, for him to furnish it wagons and horses with drivers and deliver its merchandise; that on the day in question, one of the wagons and horses proceeded south on State street at its intersection with Madison street, under the control of a servant, under the joint authority and control of said defendants; that while plaintiff was endeavoring to board a street car on State street, which was waiting for her, and while in the exercise of ordinary care for her safety, defendants so carelessly, negligently and wrongfully drove, managed and controlled the horse and wagon that they ran against and upon her, injuring her, etc.

It is insisted that appellee was guilty of contributory negligence as a matter of law.

At the time in question south bound street cars running on State street stopped to receive and discharge passengers at the intersection of Madison street on both the north and south sides of said street. At about noon, on July 26, 1909, appellee was waiting on the sidewalk on the west side

The second round charges that while plaintiff was attempting to board a street car running on State street, when was stopping for her to board, defendant failed to give a lookout and failed to warn about the time and season the street car was about to start, and that she was injured and when her, injured her, etc.

The third round charges that while plaintiff was attempting to board a street car, on State street, which was stopped for her, defendant negligently drove the horse and wagon at a high rate of speed, injured her, etc.

The fourth round charges that defendant failed to keep a lookout and failed to warn numerous persons and persons who he employed in delivering goods for various concerns upon the street; that defendant, Tracy & James Company, was engaged in the wholesale drug business, and had contracted with defendant, Keating, for his delivery of goods and horses and drivers and delivery of the merchandise; that on the day in question, one of the horses and drivers proceeded south on State street at the intersection with Madison street, under the control of a driver, under the joint control and control of said defendant; that while plaintiff was attempting to board a street car on State street, which was waiting for her, and while in the exercise of ordinary care for her safety, defendant so carelessly, negligently and wantonly drove, engaged and controlled the horse and wagon that they were injured and when her, injured her, etc.

It is insisted that appellee was guilty of contributory negligence as a matter of law.

At the time in question both street cars were running on State street stopped for her to board and discharge; and at the intersection of Madison street on both the north and south sides of said street. It should be noted, on July 12, 1907, appellee was waiting on the sidewalk on the west side

of State street, a few feet south of Madison street for the purpose of boarding a southbound car which was then standing at the corner north of Madison street, when it stopped at the south crossing. The policeman at the intersection having given the signal for traffic to move north and south appellee left the sidewalk and went onto the street for the purpose of boarding the car which she saw approaching. When the car stopped at the south crossing, appellee observed that it was too crowded to comfortably accommodate more passengers and decided to return to her former position on the sidewalk and wait for another car. While appellee was walking west on the street towards the sidewalk she was struck and injured by a horse and wagon which was being driven south on the west side of State street by one, Foucher, a servant in the employ of appellant.

The evidence shows that the direction or course of the traffic upon the street was regulated by signals given by a policeman stationed at the intersection of the two streets; that when the street car was stationary at the north crossing of the intersection appellant's horse and wagon had stopped a short distance in the rear or north of the car; that when the signal was given for traffic to proceed north and south on State street the street car and appellant's horse and wagon proceeded south across Madison street; that the street crossings at said intersection were then crowded with pedestrians; that when appellee decided not to board the street car and just before she started to return to the sidewalk she looked up and down State street, but saw no horse and wagon or other vehicle approaching from the north; that when she had walked a distance of about 8 feet from a point near the southbound car track toward the sidewalk she looked up and saw appellant's horse about 3 or 4 feet north of her;

of State Street, a few feet south of Madison Street for the
purpose of observing a neighborhood car which was then standing
at the corner north of Madison Street, when it moved at the
signal. The defendant at the intersection having
given the signal for traffic to move north and south signals
left the sidewalk and went onto the street for the purpose
of observing the car which was then standing. The car
was stopped at the south corner, signals observed that it
was the vehicle of defendant's neighborhood car. The defendant
did not intend to return to her former position on the sidewalk
but went for another car. While signals are still being
on the street towards the sidewalk the car which was stopped
at the corner and which was then standing north of the
line of State Street he saw, however, a car in the center
of the street.

The evidence shows that the defendant on coming
at the traffic upon the street was prevented by signals given
by a policeman stationed at the intersection of the two streets
that when the signal was given at the intersection
of the intersection defendant's car was then standing
at the distance in the rear of the car; that when
the signal was given for traffic to proceed north and south
of State Street the defendant and defendant's car were
prevented south across Madison Street; that the effect
of the defendant's car was then standing with other
traffic; that when signals changed and he heard the effect
car and just before the car started to return to the sidewalk
the car looked up and down State Street, but saw no car and
upon the other vehicle approaching from the north; that when
the car moved a distance of about 100 feet from a point near
the intersection car which was on the sidewalk and looking up
the defendant's car was about 100 feet north of the

that the horse was being driven at a trot and appellee was struck while attempting to avoid being injured. Appellee was not necessarily guilty of contributory negligence ^{in walking} from the side-walk to a point east of the south bound car track for the purpose of boarding the street car which customarily stopped at the south crossing. This she accomplished in safety. The evidence does not disclose the precise location of appellant's horse with reference to the street intersection at the time appellee testified she looked up the street, and in view of the rapid gait at which the horse was being driven, it may well be that the horse and wagon were then so far north of the point where appellee was struck that the crowd of pedestrians upon the street crossing obscured appellee's view of the approaching horse and wagon. The crowded condition of the street, the rate of speed at which the horse was being driven, and the right of appellee to assume, in the absence of knowledge to the contrary, that a person approaching the street crossing and traveling upon the street there in a vehicle would have the same under control, are all factors proper to be considered in determining whether or not appellee was then and there in the exercise of due care for her own safety. Under the evidence the question was not one of law, but of fact, and we are not prepared to say that the finding of the jury upon that question is contrary to the manifest weight of the evidence.

It clearly appears from the evidence that the servant of appellant was guilty of negligence. He was driving upon the crowded street at a trot without keeping a lookout, and did not observe appellee until she had been struck by the horse.

The objections to certain rulings of the court in admitting and excluding evidence are too trivial to merit discussion.

that the horse was being driven at a trot and appeared to
struggle while attempting to avoid being injured. Appell
was not necessarily guilty of contributory negligence from the
evidence to a point south of the south house and track for the
purpose of locating the horse and rider. Appell's position
at the south crossing. This was established in evidence.
The evidence does not disclose the precise location of Appel-
ling's horse with reference to the street intersection of the
the Appell testified and looked up the street, and in view
of the rapid rate at which the horse was being driven, it
may well be that the horse and rider were then so far north
of the point where Appell was struck that the street of
testimony upon the street crossing Appell's
view of the approaching horse and rider. The Appell was
driving at the street, the rate at which the horse
was being driven, and the likelihood of Appell's movement in
the direction of Appell's testimony, that a witness
crossing the street crossing and traveling upon the street
there in a vehicle would have the same view of the
all factors proper to be considered in determining whether
it was Appell's fault and that in the exercise of his
own best own safety. Under the evidence the Appell
was not one of fact, but of fact, and we are not entitled to
say that the finding of the jury upon this question is con-
trary to the manifest weight of the evidence.
It clearly appears from the evidence that the Appell
was not Appell's fault and Appell's negligence. He was driving
upon the street at a trot without being a danger,
and did not observe Appell until he had been struck by the
horse.
The objection to certain evidence of the Appell is
admitted and examined evidence was too trivial to admit
discussion.

It is said that the third instruction given at the instance of appellee improperly calls attention to the fact that any admissions made by appellant's witnesses might be taken as helpful to appellee's case. The instruction is wholly impersonal in its phraseology and is not subject to the criticism made.

There is a clerical omission in the fourth instruction given at the request of appellee, but such omission did not make the instruction harmful to appellant.

The fifth instruction, given at the instance of appellee, is as follows:

"If from the evidence in this case and under the instructions of the court, the jury shall find the defendant guilty and that plaintiff has sustained damages, as charged in the declaration, then, to enable the jury to estimate the amount of damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury themselves may make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in the ordinary affairs of life."

It is urged that, as the declaration claimed damages because appellee was prevented by her injuries from attending to her business and for obligations by reason of expenditures of money for medical care and attention, and there was no proof in support of such elements of damages, the instruction was erroneous and necessarily harmful to appellant. Appellee's declaration, as abstracted by appellant, contains no reference to the elements constituting the damages claimed by appellee, and we are not disposed to search the record in an attempt to discover error upon which to predicate a reversal of the judgment. Laird v. Dickerson, 241 Ill., 380. Furthermore, a substantially like instruction was approved in Thompson v. Northern Hotel Co., 258 Ill., 77.

The damages awarded by the jury are ample, but we cannot say they are excessive.

There is no prejudicial error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

269 - 17804.

FRANK W. RIEDER and EDITH K.
RIEDER,

Defendants in Error,

vs.

LEVI B. WHITE, BENSON LAMSON and
ARTHUR C. BACHRACH,
Plaintiffs in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

182 I.A. 430

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a decree of the Superior Court reforming a warranty deed at the instance of defendants in error, Frank W. and Edith K. Rieder, and enjoining the prosecution of a suit at law instituted in the Municipal Court by plaintiff in error, Levi B. White, against said defendants in error.

The bill of complaint filed July 22, 1910, alleges that on September 22, 1906, defendants in error were the owners in fee simple of certain lands, therein described, situated in Juneau County, Wisconsin; that on or about September 1, 1910, said White agreed to purchase said land from defendants in error and pay them therefor \$960 net to them, and to take said land subject to the lien or charge against the same of any and all installments or taxes or assessments which should become payable thereafter; that said White personally inspected said land and was informed by defendant in error, Frank W. Rieder, of the taxes and assessments which had, prior thereto, been levied upon and were a lien on said land amounting to about \$600, payable in annual installments during a period of years thereafter; that said White agreed to assume and pay the said installments of taxes and assessments then levied and a lien upon said land; that for the purpose of carrying out said verbal agreement a warranty deed

was prepared conveying and returning said land to said White, which land was executed by defendant in error and delivered to said White, who, defendant, said he returned in error the two acres which were by mistake and over-claim of defendant in error and said White no part or proper portion was located in said land so that the same was made subject to the said taxes and assessments, and he also that the parties therein took and received said land by said conveyance subject to said taxes and assessments; that defendant in error had no knowledge or notice until some time after said land was executed that it failed to convey said land in accordance with the said agreement for the said parcel, and had no notice that said White made any claim against him on account of the unpaid taxes; that on November 1, 1900, said White received a statement from said White of a claim by him for \$200.00 for a mortgage for which he was liable subject to defendant's claim; that the mortgage of said claim is a valid lien against defendant in error and is enforceable and subject; that on June 26, 1910, said White brought suit in the Municipal Court against defendant in error on a claim for a return of taxes said land, claiming \$200.00 on account of said taxes and assessments. The said White said the execution of said suit be enjoined and that said suit be returned to said White, and that if said White provide that said conveyance was made and accepted subject to the said taxes and assessments, then there is no need for the return of the same. Defendant and Arthur E. Johnson were made defendants in the said suit in the Municipal Court. After answer and verification and representation of White to the prosecution of the suit in the Municipal Court.

filed the cause was referred to a master to take the proofs and report the same, together with his conclusions. The master filed his report as directed and recommended that the relief prayed in the bill be granted, and that the bill be dismissed as to the defendants, Landon and Bachrach. After objections and exceptions to said report had been overruled the chancellor entered a decree in accordance with the findings of the master.

It is insisted by plaintiff in error that the evidence fails to show that any agreement was entered into between defendants in error and White, relative to the conveyance of the land, other and different than the one expressed in the deed.

The first formal negotiation between the parties relative to the sale of the land owned by defendants in error occurred in the early part of September, 1906, at the office of S. A. Harrison in Chicago. It is uncontroverted that upon that occasion defendant in error, Frank W. Rieder, priced the land to plaintiff in error at \$7 an acre; that shortly thereafter plaintiff in error went to Wisconsin and inspected the land and upon his return offered Rieder \$6 an acre, which offer was accepted by Rieder; that Rieder personally drafted a short form warranty deed, which was executed and delivered to plaintiff in error on September 22, 1906, who then paid to defendants in error the agreed consideration of \$260; that the land was swamp or marsh land embraced within the boundaries of a drainage district, which, in 1901 or 1902, had caused a drainage tax or assessment, payable in annual installments during a period of 20 years, to be levied against the lands within its boundaries; that subsequent to his purchase of the land plaintiff in error paid the installments for the years 1906, 1907 and 1908, as they became due and payable, and made no claim therefor against defendants in error until October, 1909.

Defendant in error, Frank W. Rieder, testified that, upon the occasion in Harrison's office, plaintiff in error asked him what he wanted for the land, and he told him he wanted \$7 an acre net; that he told plaintiff in error how the land was situated, and that it was reclaimed marsh land in a drainage district; that plaintiff in error wanted to know how near the drainage canal was and he drew a map whereon he indicated the location of the main drainage canal about 80 rods east of the quarter section and of two lateral ditches across the corners of the quarter section; that he told plaintiff in error that the cost of the ditch was to be paid by an assessment levied against the land, running for 20 years, and payable by the owner of the land in yearly installments; that in response to an inquiry by plaintiff in error as to how much the annual installments amounted to he told him he thought he had paid \$43, the previous year, and that the next installment, which would be due in January, would probably be something like that amount and would have to be paid by plaintiff in error if he owned the land then; that plaintiff in error asked for the tax receipts and he thought he gave them to him. Rieder further testified that he again saw plaintiff in error after the latter had inspected the land; that plaintiff in error then said that \$7 an acre was higher than he could buy similar land for in the same locality; that he could buy similar land for \$6 an acre and that was the price of land in that locality; that plaintiff in error then offered him \$6 an acre for the land and he accepted the offer; that he told plaintiff in error the land had cost him \$5 an acre when he bought it and he had paid the assessments for three or four years, so that would make the cost to him about \$6 an acre, and he would be selling it for just about what he paid for it; that he wrote out the deed; that

Defendant in error, Frank E. Hinder, testified that
 when the occasion in Hinder's office, Plaintiff in error
 asked that he wanted her the land, and he told him he
 wanted \$7 an acre; that he told Plaintiff in error how
 much land was situated, and that it was situated within land
 of a certain kind. That Plaintiff in error asked for
 how much the money would be and he told her that
 he indicated the location of the land and she said
 that she of the certain location and of the interest in the
 matter the amount of the money would be told.
 Plaintiff in error that the cost of the land was to be paid
 by an agreement dated against the land, running for 10 years
 and payable by the owner of the land in yearly installments;
 that in response to an inquiry by Plaintiff in error as to
 how much the annual installments amounted to he told him he
 thought it had paid \$12, the previous year, and that the next
 installment, which would be due in January, would probably be
 something like that amount and would have to be paid by
 Plaintiff in error if he owned the land then; that Plaintiff
 in error asked her the tax receipts and he thought he gave
 them to her. Hinder testified further that he again was
 Plaintiff in error after the latter had inspected the land;
 that Plaintiff in error then said that \$7 an acre was right
 and he would buy similar land for the same locality;
 that he would buy similar land for 10 acres and that was
 the price of land in that locality; that Plaintiff in error
 then offered him 10 acres for the land and he requested the
 money; that he told Plaintiff in error the land had cost
 him 10 acres when he bought it and he had told the money
 made the same by that price, so that would make the cost to
 him 10 acres at 10 cents, and he would be willing to let her

he was unfamiliar with making out legal forms, but was particular to get the description right; that the only explanation he could give for his failure to insert a provision in the deed requiring plaintiff in error to assume the payment of the balance of the drainage taxes was that he forgot all about it.

Samuel A. Harrison, a lawyer and real estate broker, who appears to have assisted in the negotiations, testified that upon the first occasion, when the parties were in his office, Rieder explained the location of the land and drew a plat; that plaintiff in error inquired about the land and about the taxes and Rieder told him the drainage tax was a yearly assessment and amounted to about \$42 the preceding year, but didn't know whether the taxes would be the same in the future or not; that there was a bond issue of \$50,000, covering a certain number of acres, amounting to about one dollar an acre; that Rieder brought his tax receipts and showed them to plaintiff in error; that the land was fairly and reasonably worth \$8 an acre subject to taxes.

Plaintiff in error testified that nothing was said by Rieder about a drainage district or drainage assessments; that Rieder gave him some tax receipts, but he had lost them; that he saw what he supposed was a drainage ditch when he inspected the land; that he never promised to assume the payment of any drainage assessments and did not learn of any such assessments until two years after the execution of the deed.

The testimony of plaintiff in error is evasive and disingenuous and entitled to little weight.

While the evidence fails to show that the parties entered into an agreement, whereby in express words plaintiff in error assumed the payment of the subsequently accruing

[illegible][illegible]

any such assessments until the year after the expiration of
the term of any business assessment and the term of
the term of the bond; that no person should be assessed the
same year that he was assessed was a business when he
was assessed; that no person should be assessed the same year
that he was assessed was a business when he was assessed;
that no person should be assessed the same year that he was
assessed was a business when he was assessed.

THE UNIVERSITY OF MICHIGAN LIBRARY

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drainage assessments, the evidence leaves no room for doubt that the land was sold by defendants in error in the belief and with the understanding that plaintiff in error would be required to pay the subsequently accruing drainage assessments, and that plaintiff in error had the like understanding, and that when he acquired the land, he fully purposed to pay such drainage assessments. The present insistence of plaintiff in error to the contrary is manifestly an afterthought. He paid such drainage assessments for three years without complaint or protest. He was informed that the land had cost defendants in error \$5 an acre in the first instance and an additional \$1 an acre for taxes and assessments, and that defendants in error agreed to accept his offer of \$6 an acre in consideration of the fact that at that figure they would realize the cost of the land to them.

Clearly, the deed as drafted does not express the actual agreement between the parties, according to their mutual understanding and intention, and its failure to do so is due, as stated by defendant in error, Frank W. Bieder, to his having forgotten to insert a provision in the deed to the effect that the conveyance was made subject to all unpaid taxes and assessments levied against the land. The omission of this or a like provision from the deed was a mistake of fact, such as will justify a court of equity in reforming the deed by inserting such provision. Dinwiddie v. Self, 145 Ill., 280; Deischer v. Price, 148 Ill., 383; Purvies v. Harrison, 151 Ill., 319.

The decree is supported by evidence which is convincing and is affirmed.

DECREE AFFIRMED.

foreign documents, the evidence leaves no room for doubt that the same was sold by defendant in error in the belief that the undersigned had authority in error would be involved in the responsibility resulting from the same.

and that plaintiff in error had the like understanding, and that when he executed the same, he fully intended to pay such

amounts. The amount involved of plaintiff in error to the contrary is manifestly an afterthought. He

will not attempt to explain the same with regard to the same. He was informed that the same had been

delivered in error to him in the first instance and an additional \$1 in error for taxes and assessments, and that

defendant in error was not aware of the same at the time he executed the same. It is manifest that the fact that he was aware of the same

was the cause of the same at the time he executed the same.

Plaintiff, the same as stated above, did not execute the

same agreement with the parties, according to their

mutual understanding and intention, and the failure to do so is due, as stated by defendant in error, to the fact that

the same was intended to be a provision in the deed to the

effect that the same was not subject to all unpaid

taxes and assessments levied against the land. The same

is also of a like provision from the deed was a mistake of

fact, such as will justify a court in equity in relieving

the deed by inserting such provision. Winkler v. Smith

100 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Y. Smith, 101 Ill., 102.

The decree is supported by evidence which is

undisputed and is affirmed.

FOR THE DEFENDANT.

October Term, 1911, No.

345 - 17881.

THE WISCONSIN LIME & CEMENT COMPANY,
Appellee,

vs.

HERMAN C. LELIVET,
Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

182 I.A. 436

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

From a judgment recovered by appellee against appellant, before a justice of the peace, appellant took an appeal to the County Court, where a trial by jury resulted in a verdict and judgment against him for \$175, to reverse which judgment he prosecutes this further appeal.

Appellant, who was a general building contractor, sublet a portion of the work on certain buildings to one Herman Stange, who purchased certain material from appellee for use in said buildings. Sometime after said materials were furnished appellee applied to Stange for payment therefor, and Stange on or about May 23, 1910, gave to appellee a written order for \$350 upon appellant. This order was never accepted by appellant in writing, but appellant paid \$175 thereon to appellee upon the receipt from appellee of a written waiver of a lien upon the buildings. In January, 1911, appellee brought suit against Stange in the Municipal Court to recover the amount claimed to be due after allowing him credit for the \$175 paid by appellant on said order. When said suit in the Municipal Court was reached for trial further negotiations between the parties resulted in appellee procuring from Stange a duplicate of the original order upon appellant which had been lost, and the dismissal by appellee of its suit against Stange. Upon the refusal thereafter of appellant to pay said claim this suit was instituted against him by appellee.

100 - 101

THE COUNTY OF COOK, ILLINOIS

HENRY C. KELLEY

COOK COUNTY

1821.A.488

MR. JUSTICE BAIRD DELIVERED THE OPINION OF THE COURT.

From a judgment rendered by the court against appellant, before a Justice of the Peace, appellant took an appeal to the County Court, where a trial by jury resulted in a verdict and judgment against him for \$175, to reverse which judgment he presented this written appeal.

Appellant, who was a general building contractor, sought a portion of the work on certain buildings on one Adams Street, and purchased certain material from appellee for use in said buildings. Sometime after said material was furnished appellee applied to George for payment therefor, and George on or about May 25, 1890, gave to appellee a written order for \$150 upon appellant. This order was never accepted by appellee in writing, but appellee said this amount to appellee upon the receipt from appellee of a written order of a like upon the buildings. In January, 1891, appellee brought suit against George in the Municipal Court to recover the amount claimed to be due after allowing him credit for the \$175 paid by appellee on said order.

When said suit in the Municipal Court was reached for trial certain negotiations between the parties resulted in appellee procuring from George a duplicate of the original order upon appellant which had been lost, and the dismissal by appellee of his suit against George. Upon the refusal of appellant to pay said claim this suit was instituted against him by appellee.

The evidence for appellee tends to show and the jury were warranted in finding that upon the occasion when appellant paid \$175 upon the original order, and when he secured from appellee a waiver of its lien, he promised to pay the balance of the order in sixty days, and that in January following, when appellee procured a duplicate order from Stange and dismissed its suit against the latter, such action was taken upon the promise of appellant to pay the balance of the claim.

The written order in evidence corresponds precisely with the definition of a bill of exchange, as stated in Section 125 of the Negotiable Instruments Act, ^(J&A 7765) but no recovery can be had thereon, because the same was not accepted in writing and signed by appellant, as required by Section 131 of said act. ^(J&A 7771)

Ignoring the order, however, as the basis of a right of recovery, there is evidence which justified the jury in finding that a contract of novation was entered into between the parties, whereby appellant became liable to pay to appellee the amount in controversy.

The record is not free from error relating particularly to the liability of appellant upon the order in evidence, but as the competent evidence in the record is sufficient to support a recovery on the theory of a novation the judgment stands for substantial justice within the established rules of law and will be affirmed.

JUDGMENT AFFIRMED.

The evidence for appellee tends to show that the
jury were satisfied in finding that upon the occasion when
appellee paid \$175 upon the original order, and when he
received from appellee a bill of lading, he promised to
pay the balance of the order in sixty days, and that in
January following, when appellee procured a duplicate order
from Woods and dismissed his suit against the latter, such
action was taken upon the promise of appellee to pay the
balance of the claim.

The record shows in evidence the following
with the definition of a bill of exchange, as stated in
Section 125 of the Negotiable Instruments Act, and no recovery
can be had thereon, because the same was not accepted in
writing and signed by appellee, as required by Section 121
of said act.
Ignoring the other, however, as the basis of a
claim of recovery, there is evidence which justified the
jury in finding that a contract of payment was entered into
between the parties, whereby appellee became liable to pay
the amount in controversy.

The record is the true and correct statement
of the liability of appellee upon the order in evidence,
and as the competent evidence in the record is sufficient to
support a recovery on the theory of a novation the judgment
should be affirmed. There is no error in the evidence
of law and will be affirmed.

THE COURT AFFIRMS.

371 - 17907.

MICHAEL GLIATTO,
Appellee,

vs.

WILLIAM DOBRITZ et al.,
On Appeal of WILLIAM DOBRITZ,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

182 I.A. 437

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

~~Appellee, Michael Gliatto,~~ the judgment creditor of Christian Dobritz, ~~filed his bill in equity in the nature of a creditor's bill in the Superior Court against Christian Dobritz, William Dobritz and Joseph F. Baumrueck to set aside a conveyance of certain real estate from Christian Dobritz to William Dobritz as having been made to hinder, delay and defraud appellee in the collection of his judgments. Upon the hearing before the chancellor a decree was entered setting aside said conveyance as against appellee, subjecting the real estate to the lien of appellee's judgments, and appointing a receiver to collect the rents of the premises and apply the same in payment of said judgments. William Dobritz alone appeals from this decree.~~

It was stipulated upon the hearing that the defendants, Christian Dobritz and Joseph F. Baumrueck, were duly served and defaulted; that in the original suits in the Municipal Court by appellee against Christian Dobritz judgments were obtained by default; that Christian Dobritz who owned the premises in question conveyed the same by deed to his son, William Dobritz, the appellant, on September 14, 1909, one day prior to the recovery by appellee of the first of said judgments; and that said judgments are wholly unsatisfied.

The errors assigned upon the record are presented to us in gross with an informality and brevity (however much

brevity may be desirable) which affords no assistance whatever in the consideration and determination of the errors assigned, and the decree might well be affirmed for that reason. We have, however, elected to consider the case upon its merits as presented in the record.

It is clearly established by the evidence that the conveyance in question was made for the express purpose and with a fraudulent intent on the part of both the grantor and the grantee to defeat the collection by appellee of his judgments against Christian Dobritz. In this state of the case it is immaterial to determine whether or not appellant paid his father a valuable and adequate consideration for the property conveyed.

"A transfer of property must not only be upon a good consideration, but it must also be bona fide. Even though the grantee or assignee pays a valuable, adequate and full consideration, yet if the grantor or assignor sells for the purpose of defeating the claims of his creditors, and such grantee or assignee knowingly assists in effectuating such fraudulent intent, or even has notice thereof, he will be regarded as a participator in the fraud, for the law never allows one man to assist in cheating another." Beidler v. Crane, 135 Ill., 92; Clark v. Harner, 215 Ill., 24.

While the conveyance was subject to be set aside as to appellee, it was valid and binding as between the parties to it, and there was no error in setting aside the conveyance as to appellee alone. Ward v. Enders, 29 Ill., 519; Harmon v. Harmon, 63 Ill., 512.

It is suggested here that the premises conveyed constituted the homestead of the grantor, Christian Dobritz, and were exempt from execution, and that a conveyance of property which is so exempt can not be set aside as fraudulent at the instance of a creditor.

- 2 -

previously may be desirable) which affords no assistance whatever in the consideration and determination of the various questions, and the answer might well be withheld for that reason. The Court, however, elected to consider the case upon its merits as presented in the record.

It is chiefly warranted by the evidence that the guarantee in question was made for the purpose of procuring for the defendant interest on the part of both the grantor and the grantee to effect the collection by means of this judgment against Christian Lohr. In this case the Court is not inclined to believe that the defendant was not actually paid the interest on the judgment and therefore considered for the purpose of the case.

"A transfer of property must not only be made in good consideration, but it must also be for value. Even though the grantor or assignor pays a valuable, adequate and full consideration, yet if the grantor or assignor sells for the purpose of defrauding the claim of his creditors, and such grantor or assignor knowingly assigns in defrauding the defendant interest, or even has notice thereof, he will be treated as a participant in the fraud, for the law never allows one who is guilty of such a wrong to recover." Belcher v. Belcher, 125 Ill. 2d 111, 112, 113, 114.

While the defendant was subject to the law of the State, it was well established as between the parties to the case that no error in writing exists in the conveyance to the defendant. Belcher v. Belcher, 125 Ill. 2d 111, 112, 113, 114.

It is suggested here that the defendant was not entitled to the benefit of the transfer, Christian Lohr, and was bound to pay the interest, and that a conveyance of property which is not subject to the law of the State is not enforceable at the instance of a creditor.

This question does not appear to have been raised in the court below, and the record does not disclose affirmatively the facts necessary to sustain a claim that the property in question, when it was conveyed, was the homestead of the grantor. The question is not presented for our determination upon the record.

The decree is right and is affirmed.

DECREE AFFIRMED.

This question has not been raised in the report, and the report does not discuss it. It is necessary to mention it in the report, when it is conveyed, and the knowledge of the question. The question is not presented for our determination.

THE REPORT IS IN THE HANDS OF THE BOARD.

REPORT ATTACHED.

Nov Term, 1911, 1912

452 - 17992.

SOPHIA BERG,
Appellee,

va.

CHARLES FISHER,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

182 I.A. 449

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is a suit by appellee against appellant to recover damages for personal injuries, wherein a trial by jury in the Circuit Court resulted in a verdict and judgment against appellant for \$1,000. The declaration charges that on March 14, 1910, appellant was using and operating an automobile and driving same along Madison street near its intersection with California avenue in the City of Chicago; that appellee was walking along and upon said Madison street and in the exercise of ordinary care for her own safety; that appellant so negligently and carelessly ran, operated and managed said automobile that by reason thereof said automobile ran against and violently struck appellee and she was thrown with great force and violence to the street, and thereby injured, etc.

Relative to the questions of fact involved it is urged that a consideration of the evidence discloses that appellant was not guilty of negligence; that appellee was guilty of contributory negligence; and that the damages awarded by the jury are excessive.

At about 6 o'clock on the evening of February 14, 1910, appellant, accompanied by his son, Charles D. Fisher, his wife and Miss McNulty, were riding west on Madison street in appellant's two seated automobile, which was being driven by appellant's son, who, with his father, occupied the front

EXHIBIT

EXHIBIT

EXHIBIT

100 - 1777

EXHIBIT

THIS is a bill by a party against defendant to
 recover damages for personal injuries, wherein a trial by
 jury in the Circuit Court resulted in a verdict and judgment
 against defendant for \$1,000. The declaration charges that
 on March 14, 1910, defendant was driving and operating an
 automobile and driving same along Madison street near the
 intersection with California avenue in the City of Chicago;
 that plaintiff was walking along and upon said Madison street
 and in the exercise of ordinary care for her own safety;
 that defendant as negligently and carelessly ran, operated
 and managed said automobile that by reason thereof said
 automobile ran against and violently struck plaintiff and
 she was thrown with great force and violence to the street,
 and thereby injured, etc.

Relative to the question of fact involved it is
 upon that a consideration of the evidence discloses that
 plaintiff was not guilty of negligence; that defendant was
 guilty of contributory negligence; and that the damages
 awarded by the jury are excessive.

As shown in Exhibit on the evening of February 14,
 1910, plaintiff, accompanied by his son, Charles D. White,
 his wife and Miss McNulty, were riding west on Madison street
 in plaintiff's car seated at the rear, which was being driven
 by plaintiff's son, who, with his father, occupied the front

seat. As the automobile approached California avenue from the east, it was running in the north or west bound street car track. The roadway on either side of the two street car tracks there was impassible for travel by reason of the accumulation of snow and ice. A west bound street car which immediately preceded the automobile was stopped at the intersection of California avenue by reason of a blockade of street cars ahead of it, one of which cars was then discharging and receiving passengers at the usual stopping place on the west line of California avenue. When the street car, which immediately preceded the automobile, stopped, the automobile was turned to the left upon the south or eastbound track, and so proceeded west until it was stopped after appellee was struck. Appellee alighted from the rear platform at the north side of the street car which had stopped at the west line of California avenue, and walked around the rear of said car and in front of the one immediately behind it for the purpose of crossing Madison street and proceeding south to her home. As appellee emerged from between the two street cars and was crossing the south or east bound car track, she was struck by appellant's automobile and sustained the injuries complained of.

Witnesses on behalf of appellee testified that as the automobile approached the place where appellee was struck it was running "fast", at an estimated speed of 15 to 25 miles an hour, and that no horn or other signal of its approach was sounded, while the occupants of the automobile testified that when it was turned into the south or east bound car track its speed was reduced to from four to six miles an hour and that the signal horn was blown continuously. Appellant and his son both testified that when they first saw appellee, as she emerged from between the two street cars, she was fifteen

101. In the automobile approached California Avenue from
the east, it was running in the north or west bound street
102. The roadway on either side of the two streets
103. The roadway was impassable for travel by reason of the
104. accumulation of snow and ice. A east bound street car
105. which immediately preceded the automobile was stopped at the
106. intersection of California Avenue by reason of a double
107. street car ahead of it, one of which cars was then dis-
108. playing and receiving passengers at the usual stopping place
109. at the west line of California Avenue. When the street
110. car, which immediately preceded the automobile, stopped,
111. the automobile was turned to the left upon the south or
112. eastbound track, and so proceeded west until it was stopped
113. after crossing the street. Another double street car
114. was stopped at the north side of the street car which had
115. stopped at the west line of California Avenue, and which
116. around the rear of said car and in front of the one immediately
117. behind it for the purpose of crossing Mission Street and
118. proceeding south to her home. As a police officer from
119. between the two street cars and was blocking the south or
120. east bound car track, the two street cars by the front of the automobile
121. and explained the injury as explained of.
122. Witnesses on behalf of appellee testified that as
123. the automobile approached the place where appellee was struck
124. it was running "fast", at an estimated speed of 15 to 20 miles
125. an hour, and that no horn or other signal of its approach was
126. sounded, while the occupants of the automobile testified that
127. when it was turned into the south or east bound car track
128. the right was reduced to from two to six miles an hour and
129. that the street car was ahead continuously. Appellee and
130. his son both testified that when they first saw appellee, he
131. was standing between the two street cars, and was fifteen

or twenty feet distant from the automobile. Appellant's son testified that at a speed of four or five miles an hour the automobile could have been stopped within a distance of three or four feet, considering the condition of the street, and that while running at a speed of 15 or 20 miles an hour the automobile could have been stopped within a distance of 10 to 15 feet. It is uncontroverted that after appellee was struck she became entangled beneath the forward portion of the automobile and was dragged a distance of from 10 to 15 feet along the track before the automobile was brought to a stop. The same witness also testified that he observed the street car from which appellee alighted, as it stood at the west line of California avenue, and knew that passengers were then alighting from said car.

In driving the automobile west upon the east bound street car track the driver was violating the law of the road. If the exigencies of the situation required the automobile to be driven west upon the east bound track, for the purpose of passing the blockaded street cars, ordinary care on the part of the driver demanded that he keep the automobile under control, so as to avoid injuring persons who might be crossing the street at the point where appellee was struck. We have no hesitancy in holding that, whether or not the driver of the automobile was guilty of negligence, as charged in the declaration, was, under the evidence, a question of fact for the jury, and that their determination of that issue is amply supported by the evidence. Upon a consideration of the testimony of Charles D. Fisher the jury were justified in concluding either that he was driving the automobile at a speed of approximately 20 or 25 miles an hour, or that he was driving the same heedlessly and did not see appellee until she was struck.

Appellee testified that, as she went south between

AN EXHIBIT IN THE CASE OF THE PEOPLE VS. ...

was testified that at a speed of four or five miles an hour the automobile could have been stopped within a distance of 100 feet, considering the condition of the street, and that while running at a speed of 15 or 20 miles an hour the automobile could have been stopped within a distance of 150 feet. It is understood that after applying the brakes the person operating the automobile was in a position to stop the automobile at a distance of 10 to 15 feet from the point where the automobile was stopped at a speed of 15 or 20 miles an hour. The same witness also testified that he observed the automobile stop from which the witness testified, as it stood at the intersection of California Avenue, and knew that passengers were being alighted from said car.

In leaving the automobile went upon the east bound street car track the driver was violating the law of the road. At the intersection of the situation required the automobile to be driven west upon the east bound track, for the purpose of clearing the blocked street cars, ordinary care on the part of the driver demanded that he keep the automobile under control, so as to avoid injuring persons who might be crossing the street at the point where collision was struck. He had no testimony in holding that, whether or not the driver of the automobile was guilty of negligence, as charged in the indictment, and, under the evidence, a question of fact for the jury, and that their determination of that issue is solely suggested by the evidence. Upon a consideration of the testimony of Charles E. Fisher the jury were instructed in determining either that he was driving the automobile at a speed of approximately 20 or 25 miles an hour, or that he was driving the same negligently and did not use vigilance until the car struck.

Agencies testified that, as the road south between ...

the two street cars, she glanced toward the east, but saw nothing approaching; that as she was about to cross an east bound street car track her attention was more particularly directed in observing whether a car was approaching on that track from the west; that prior to being struck by the automobile she had no notice or knowledge that it was approaching from the east. Whether or not the conduct of appellee, upon the occasion in question, and in view of the situation as it then and there existed, constituted reasonable care for her safety, was a question of fact as to which, upon this record, the verdict of the jury must be held to be conclusive. Counsel for appellant press upon our attention the testimony of three or four witnesses to the effect, in substance, that appellee on several occasions in conversations relative to the occurrence in question said it was as much her fault as it was Mr. Fisher's. This statement, if made by appellee, was the expression merely of her conclusion in ignorance of the conduct of the driver of the automobile. It was not the statement of a concrete fact inconsistent with the exercise of ordinary care for her own safety. True, appellee might have avoided the injury if before attempting to cross the east bound street car track she had exercised greater caution in looking to the east to observe whether a vehicle was approaching from that direction, but under the existing facts, it can not be said that in failing so to do appellee was chargeable with a want of ordinary care. Under all the facts and circumstances appearing in the record we are not disposed to attach to this statement a weight and importance which makes it conclusive against appellee upon that issue.

The evidence relating to the character and extent of appellee's injuries is sharply conflicting. If the

the two street cars, she advanced toward the east, but saw nothing approaching; and as she was about to cross an east-bound street car passed her attention was more particularly attracted in observing that a car was approaching from the west. She then saw the car; that time it being stopped by the automobile she had no notice of the fact that it was approaching from the west. Whether or not the conduct of the witness, upon the occasion in question, and in view of the situation as it then and there existed, constituted reasonable care for her safety, was a question of fact as to which, upon this record, the verdict of the jury must be held to be conclusive. Counsel for appellant press upon our attention the testimony of three or four witnesses to the effect, in substance, that evidence on several occasions in conversations relative to the occurrence in question said it was as much as this as was the witness. This statement, if true, by itself, and the expression merely of her conclusion in substance of the conduct of the driver of the automobile. It was not the statement of a separate fact independent of the exercise of ordinary care for her own safety. True, the evidence which was called for the fact in relation to the fact that she saw the car from the west and was surprised to find the car from the west in the west to observe whether a vehicle was approaching from that direction, but under the existing facts, it can not be said that in failing to do so, she was chargeable with a want of ordinary care. Under all the facts and circumstances appearing in the record we are not disposed to attach to this statement a weight and importance which makes it conclusive against evidence upon the fact.

The evidence relating to the character and extent of appellant's injuries is largely conflicting. It has

testimony of appellee and of her attending and examining physicians is true, her injuries are severe and permanent, and the damages are not excessive. We would be unwarranted in saying that in estimating the damages which appellee sustained the jury were influenced by passion or prejudice, or that they failed to properly consider and weigh the evidence bearing upon that question.

The court did not err in refusing to strike out the testimony of appellee's witness, C. B. Jackman, relative to the automobile and the speed at which it was traveling. Jackman was employed as a clerk in a drug store located on the southwest corner of Madison street and California avenue, into which store appellee was carried after she was injured. He testified that coincident with the occasion in question he was engaged in the store and saw an automobile coming from the east and running very fast on the south side of Madison street; that he did not leave the store; that he did not see the automobile come to a stop, but saw it after it had stopped and saw the crowd gathered around it; that when he first noticed the automobile he saw two persons in the front part of it. The witness was not able to identify the automobile as the one which belonged to appellant, but in view of all the facts and circumstances in evidence, and the coincidence of time and place, it was fairly a question for the jury whether the automobile which he observed was the automobile in question.

Appellant's objections to certain hypothetical questions propounded to a witness called by appellee as a medical expert, and to the answers of said witness to said questions, are fully considered and determined in Shaughnessy v. Holt, 236 Ill., 485, and cases there cited.

The thirteenth instruction tendered by appellant

testimony of appellee and of her attending and examining physicians is true, her injuries are severe and permanent, and the damages are not excessive. We would be warranted in saying that in estimating the damages which appellee sustained the jury were influenced by passion or prejudice, or that they failed to properly consider and weigh the evidence bearing upon that question.

The court is not at all reticent to strike out the testimony of appellee's witness, G. B. Jackson, relative to

the automobile and the speed at which it was traveling. Jackson was employed as a clerk in a drug store located on the southwest corner of Madison street and California avenue, into which store appellee was carried after she was injured.

He testified that coincident with the accident in question he was engaged in the store and saw an automobile coming from the east and running very fast on the south side of Madison street; that he did not leave the store; that he did not see the automobile come to a stop, but saw it after it had stopped and saw the crowd gathered around it; that when he first noticed the automobile he saw two persons in the front seat of it. The witness was not able to identify the automobile as the one which belonged to appellee, but in view of all the facts and circumstances in evidence, and the similarity of time and place, it was fairly a question for the jury whether the automobile which he observed was the automobile in question.

Appellee's objections to certain hypothetical questions propounded to a witness called by appellee as a medical expert, and to the answers to said witness to said questions, are fully considered and determined in Whelan v. Holt, 220 Ill. 442, and cases there cited. The identical instruction tendered by appellee

was too narrow in its scope with reference to the negligence charged in the declaration and was properly refused. The subject matter of the instruction was sufficiently covered by other instructions given to the jury.

There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

475 - 18015.

JENNIE SHAFFNER,
Appellee,
vs.
B. M. SHAFFNER,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

182 I.A. 450

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is an appeal by B. M. Shaffner from an order of the Circuit Court committing him for contempt for his failure to pay to his former wife, Jennie Shaffner, the installments of alimony for December, 1910, and January and February, 1911, as provided in the former decree of the court.

The decree of divorce was entered October 23, 1888, and a decree fixing the amount of alimony to be paid by appellant at \$80 per month was entered October 28, 1888. On March 30, 1905, a decree was entered declaring the alimony fixed by the former decree to have been paid to May 1, 1905, and fixing the alimony to be thereafter paid at \$50 per month. On March 24, 1911, appellee filed her affidavit showing that appellant had failed to pay the installments of alimony as above stated, and thereupon appellant, in response to an order to show cause, etc., on March 29, 1911, filed his sworn answer stating that he is without means or money to pay the sum due or any part thereof, and has been so unable since the same accrued and long before; that he intends paying the same as soon as he gets money and verily believes he will be able to pay the same within 30 or 40 days; that he has no property except his law library and household furniture, upon which there is a chattel mortgage of \$1,000; that he is heavily indebted and owes about \$7,000, considerable of which is in judgments; that he owes \$276 for office rent, about \$100 for

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It is a pleasure to have you here today.

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1. 1990年12月31日以前，在北京市行政区域内，从事生产、经营活动的个体工商户，其应纳税额在1000元以下（含1000元）的，暂免征收个人所得税。

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

WILLIAM H. HARRIS, JR., 1000, 11th St., N.W., Wash., D.C.

vi et doli. Te aliamquam, XXX, NY 10001, ante me detinuit

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

rent of the flat he occupies, for which he pays a rental of \$50 per month, and a house keeper \$7 per week; that it costs him about \$15 per week for groceries, meats, etc.; that his office rent is \$53.50 per month; that he is 63 years old and a lawyer and has his son as a partner equally interested in the business; that for the last eight months he and his son have not averaged to exceed \$75 per month in said law business; that for the month of March, 1911, the receipts have been about \$55; that for many years past he has kept no books of account in his business, because of the small volume of said business; that out of the receipts he pays office and living expenses and divides the surplus, if any, with his son; that he has been compelled to borrow and has borrowed money from friends and clients during the last five and six months with which to pay living expenses, and which money is still owing; that during the last six months he has not expended to exceed \$25 on himself for clothing and necessary wearing apparel.

It is first urged that the verified return of appellant, which was alone considered by the chancellor, shows a complete inability to pay the alimony due, and that the rule to show cause should have been discharged.

In Shaffner v. Shaffner, 213 Ill., 492, upon a showing more favorable to appellant than in the case at bar, the court had the same question under consideration, and held that the order committing appellant for contempt was properly entered. Since the decision upon the former appeal the alimony has been reduced to \$50 a month, and appellant appears to have been relieved from the necessity, which then existed, of supporting his subsequently acquired wife and step daughter. Although living as a single man, he occupies a flat at a rental of \$50 a month, and employs a housekeeper, to whom he pays \$7 a week. Since the hearing upon his former appeal, appellant has voluntarily incurred an added incumbrance in

the acquisition of a partner, with whom he divides the earnings in his business. Appellant states in his verified return that the receipts from his business have not averaged \$75 per month, but he fails to state his earnings in his business. While appellant appears to keep no books of account, he may nevertheless keep a mental ledger.

The showing by appellee that appellant had failed to comply with the decree directing the payment of alimony afforded prima facie evidence of contempt, and the burden was thereby cast upon appellant to show that his failure in that regard was due entirely to his inability to pay. Shaffner v. Shaffner, supra. The showing made by appellant was insufficient to purge him of contempt.

It is next urged that as the original decree requiring the payment of alimony to appellee was entered in 1888, any remedy for a failure to comply with such decree is barred by the twenty year statute of limitations; that there is no distinction in this respect between judgments at law and decrees in equity; that both out-law in twenty years, unless revived within that period after rendition.

Appellant entirely ignores the fact that the last decree in the case was entered in 1905, but if the decree of 1905 be disregarded, it must still be held that the decree of 1888, whereby appellant was required to pay alimony in monthly installments, is a continuing order, as to which the statute of limitations does not begin to run until the last installment becomes due.

In Craig v. Craig, 163 Ill., 176, it was held that alimony decreed upon the dissolution of a marriage, if payable in installments, is, unless otherwise specifically provided, an allowance for the support of the beneficiary during the joint lives of herself and her divorced husband. If the duty of support continues during the joint lives of the parties,

the acquisition of a partner, with whom he divided the earnings
of his business. Applicant stated in his verified return that
the earnings from his business were not reported for 1934.
But he fails to state his earnings in his business. While
applicant appears to lack the basis of income, he was never
paid any amount of money.

The showing by applicant that applicant had failed
to comply with the decree directing the payment of alimony
attaches three false statements of earnings, and the burden was
clearly cast upon applicant to show that his failure in that
respect was not material to his liability to pay. Material
misstatements. The showing made by applicant was insuffi-
cient to purge him of contempt.

It is next urged that as the original decree re-
quiring the payment of alimony to applicant was entered in
1934, any remedy for a failure to comply with such decree is
barred by the twenty year statute of limitations; that there
is no distinction in this respect between judgments at law
and decrees in equity; that both expire in twenty years; and
that applicant's claim that period after rendition.

Applicant entirely ignores the fact that the last
decree in the case was entered in 1936, and at the same time
it is suggested, it must still be held that the decree of
1934, whereby applicant was required to pay alimony to applicant
indefinitely, is a continuing order, so to speak, the statute
of limitations does not begin to run until the last installment
is due.

In Smith v. Smith, 122 Cal. 170, it was held that
alimony decreed upon the dissolution of a marriage, it remains
indefinite, for unless otherwise specifically provided,
an allowance for the support of the wife is continuing until the
joint lives of husband and wife are terminated. If the
duty of support continues during the joint lives of the parties,

it is clear that a decree providing for the payment of alimony in installments, as in the case at bar, cannot be affected by the statute of limitations.

If the decree had provided for the payment of a sum in gross, as alimony, a different question would be presented.

The order is affirmed.

ORDER AFFIRMED.

It is stated that a certain amount of money
is available, as in the case of the
the estate of the deceased.

If the above is correct, the amount of
as alimony, Δ the amount of the
in the case, the amount of the
The order is affirmed.

COMMON SENSE.

476 - 18016.

JENNIE SHAFFNER,
Appellee,
vs.
B. M. SHAFFNER,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

182 I.A. 451

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is an appeal by B. M. Shaffner from an order of the Circuit Court committing him for contempt for his failure to pay to his former wife, Jennie Shaffner, the installments of alimony for March and April, 1911, as provided in the former decrees of the court.

The precise questions here involved were considered and determined in Shaffner v. Shaffner, No. 18016, in which case the opinion of this court has this day been filed, and for the reasons there stated the order of the Circuit Court will be affirmed.

ORDER AFFIRMED.

THE - INDEX.

STREET, NEW
CINCINNATI COUNTY,
DOON COUNTY.

JOHN W. BROWN,
JOHN W. BROWN,
JOHN W. BROWN.

1881 A. 451

THE COURT HAS DELIVERED THE VERDICT IN THIS CASE.

THIS IS AN APPEAL BY B. W. BROWN FROM AN ORDER

OF THE CIRCUIT COURT, COMMENDING HIM TO THE CUSTODY FOR HIS

FAILURE TO PAY TO HIS TOWNSHIP WIFE, JENNIE BROWN, THE

ARRESTMENT OF ALIBONY FOR BURN AND STEAL, 1881, AS PROVIDED

IN THE TOWNSHIP ORDER OF THE COURT.

THE CIRCUIT COURT HAS ORDERED THAT BROWN

BE RELEASED IN SHARP V. BROWN, NO. 1881, IN WHICH

WAS THE OPINION OF THIS COURT HAS THIS DAY BEEN FILED, AND

FOR THE REASON STATE THE COURT IN THE CIRCUIT COURT

WILL BE AFFIRMED.

ORDER AFFIRMED.

57 - 18079.

182 I.A. 451²

CLAUDE B. DAVIS, doing business as
CLAUDE B. DAVIS & COMPANY,
Defendant in Error,

vs.

MAX J. STRAUCH and WILHELMINA STRAUCH,
Plaintiffs in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to review a purported record of certain proceedings in the Circuit Court, wherein defendant in error recovered a judgment against plaintiffs in error for \$208, which judgment plaintiffs in error, at a subsequent term of said court, sought unsuccessfully to have vacated and set aside.

The purported abstract filed by plaintiffs in error is a mere index of the record and is wholly insufficient to present the questions sought to be raised for our consideration.

Furthermore, notwithstanding there is no bill of exceptions in the record, the record contains a bill of particulars, together with certain motions and affidavits, which can only be properly preserved by a bill of exceptions. Star Brewery v. Farnsworth, 172 Ill., 347; Bartenfeld v. Klein Co., 107 Ill. App., 66; Christie v. Walker, 126 Ill. App., 424.

The judgment is affirmed.

JUDGMENT AFFIRMED.

182 I.A. 452

MAPLEWOOD COLLIERY COMPANY,
Plaintiff in Error,

ERROR TO

vs.

SUPERIOR COURT,

OTTO F. SIEBENMANN,
Defendant in Error.

COOK COUNTY.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to review the record of certain proceedings in the Superior Court, wherein in an action of replevin brought by plaintiff in error against defendant in error an alternative judgment was rendered that plaintiff in error return the property described in the writ to defendant in error, and in default of such return that defendant in error have and recover from plaintiff in error \$270 and costs of suit.

To the declaration in the usual form defendant in error pleaded, first, non cepit, second, non distinct, third, property in another, and fourth, that the property was delivered to defendant in error to perform certain work upon the same and furnish certain materials, and that defendant in error performed said work and furnished said materials, whereby plaintiff in error became indebted to him in the sum of \$400, to secure the payment of which defendant in error was entitled to detain the said property.

Upon the overruling of motions interposed by plaintiff in error for a continuance a jury was impanelled to try the case, and such trial proceeded in the absence of plaintiff in error and resulted in a verdict as follows:

"We, the jury, find the issues for the defendant and find the amount due from the plaintiff the sum of Two Hundred and Seventy Dollars and assess the damages at the sum of Two Hundred and Seventy Dollars."

Upon the motion for a new trial defendant in error remitted the damages for the detention of the property to one cent, and the motion for a new trial was then overruled and judgment entered as follows:

"That the plaintiff make return within ten days of the property seized by virtue of the replevin writ aforesaid, viz:*****and that in default of such return, the defendant have and recover from the plaintiff the sum of \$270.00 and costs of suit, and that he have execution therefor."

It is first urged that the motion of plaintiff in error for a continuance was improperly denied. The record discloses that in support of the motion first made for a continuance, which was denied by the court, the affidavit filed by plaintiff in error failed to conform to the requirements of the statute, and that on the following day plaintiff in error again moved for a continuance upon the same ground, and in support of such motion, which was also denied by the court, plaintiff in error filed a sufficient affidavit. The motion for a continuance first interposed was properly denied, and to have granted the second motion, based upon the like ground, would have been equivalent to improperly permitting plaintiff in error to amend its motion for a continuance. Both motions were properly denied.

Stockley v. Goodwin, 78 Ill., 137; Northeastern Ala Ass'n v. Frimm, 124 Ill., 100.

It is next urged that the instruction given to the jury as to the form of verdict was improper. The propriety of the action of the court in giving this instruction is not properly preserved for review, but if it were we should be obliged to hold that no harm resulted to plaintiff in error by the giving of the instruction. The uncontroverted evidence fully establishes the facts averred in the fourth special plea filed by defendant in error, and the instruction, together

with the verdict and judgment, are clearly and properly referable to said plea.

There is no assignment of error calling in question the action of the court in permitting the cause to proceed to trial without a rule on plaintiff in error to reply to the several pleas, and plaintiff in error is, therefore, precluded from raising the point.

A judgment in the alternative was properly entered.
Janes v. Gilbert, 168 Ill., 627.

The judgment is affirmed.

JUDGMENT AFFIRMED.

with the verdict and judgment, and clearly and properly

responsible for said error.

There is no need of any other finding in question

the action of the court in sustaining the cause to proceed

to trial without a trial on the merits in order to verify the

verdict given, and judgment is given for defendant, awarded

from raising the issue.

A judgment in the alternative was properly entered.

James v. Liberty, 100 Ill. 207.

The judgment is affirmed.

FOR THE APPELLATE COURT

124 - 18155.

182 I.A. 453

FERDINAND W. JAROS,
Plaintiff in Error,
vs.
EDWARD JOHANNING and A. M.
WERTZBERGER,
Defendants in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BAUNE DELIVERED THE OPINION OF THE COURT.

In a suit brought by plaintiff in error against defendants in error in the Municipal Court to recover \$328.50, alleged to be due for legal services, a trial by jury resulted in a verdict and judgment against defendants in error for \$3.50, admitted to be due, and plaintiff in error, being aggrieved by the insufficiency of such judgment, prosecutes this writ of error.

In June, 1909, defendants in error, who were conducting a laundry business, as partners, and one, Hilborn, were made defendants in a suit instituted against them in the Circuit Court by the Schriver Laundry Company to enjoin them from employing and permitting said Hilborn to solicit the business of said laundry company, and plaintiff in error was consulted and retained by them to defend said suit. Plaintiff in error claims that the services rendered by him in said suit were reasonably worth the sum of \$500, and defendants in error do not contest the reasonable value of such services, but deny liability therefor. In March, 1910, defendants in error were made defendants in a suit instituted against them in the Municipal Court by one, Richards, and plaintiff in error was retained by them to defend said suit. For his services in the Richards case plaintiff in error charged \$25, and the reasonableness of said charge is admitted, but liability therefor is denied. From the decree entered against them

1821.A.453

IN RE
MUNICIPAL COURT
ON CHARGE.

EDWARD T. JAROS,
Plaintiff in Error,
vs.
JAMES H. RICHARDS,
Defendant in Error.

THE JUDICIAL BOARD REVIEWED THE OPINION OF THE COURT.

In a suit brought by plaintiff in error against

defendant in error in the Municipal Court to recover \$300.00,
alleged to be due for legal services, a trial by jury resulted

in a verdict and judgment against defendant in error for

\$300.00, admitted to be due, and plaintiff in error, being

satisfied by the insufficiency of such judgment, procured
this writ of error.

In June, 1902, defendant in error, who was con-

ducting a laundry business, as partners, and one, Hilborn,

were made defendant in a suit instituted against them in the

Circuit Court by the Garretts Laundry Company to enforce their

contract employing and permitting said Hilborn to collect the

balance of said laundry company, and plaintiff in error was

summoned and retained by them to defend said suit. Plaintiff

in error claims that the services rendered by him in said suit

were reasonably worth the sum of \$100, and defendant in error

is now contest the reasonable value of such services, but

has liability therefor. In March, 1902, defendant in error

were made defendant in a suit instituted against them in the

Municipal Court by one, Richards, and plaintiff in error was

retained by them to defend said suit. For his services in

the Richards case plaintiff in error charged \$25, and the

reasonableness of said charge is admitted, but liability

therefor is denied. From the decree entered against them

in the Circuit Court defendants in error prayed an appeal to the Appellate Court, and thereafter plaintiff in error withdrew his appearance in said case for the reason that defendants in error had failed and refused to pay for services rendered by him, and for the like reason plaintiff in error withdrew his appearance in the Richards case in the Municipal Court. Defendants in error deny liability for the services of plaintiff in error in the injunction case upon the ground, as they allege, that plaintiff in error agreed to perform said services upon a contingent fee to be realized by him from the complainant upon the injunction bond for \$500. Liability for the services of plaintiff in error in the Richards case is denied upon the ground that plaintiff in error agreed to render all necessary services in said case for \$25.

Upon the issues of fact involved, it is sufficient to say that the evidence is so closely conflicting that, if no prejudicial error had intervened, we should have been compelled to accept the verdict of the jury as final. The record, however, discloses that after the close of all the evidence and after the arguments of counsel, the trial court, before instructing the jury as to the law of the case, read to the jury the affidavit of merits or defense filed in the case by defendant in error Johanning. The affidavit of merits, as drafted, sets out the defendants' version of the controversy in detail, and the procedure adopted by the court improperly emphasized its significance and was calculated to prejudicially influence the jury to give undue weight to the sworn statements therein contained. If the sworn statement of claim filed by plaintiff in error had also been read to the jury the effect of the action of the court in reading the affidavit of merits filed on behalf of defendants in error might have been minimized.

The objections urged to the rulings of the court upon the instructions are untenable.

As the judgment must be reversed for the reason above given, it is unnecessary to consider and determine the error assigned upon the action of the court in refusing to grant a new trial upon the ground of newly discovered evidence.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

The suggestion is made in the report of the board

that the investigation was satisfactory.

As the subject was not referred for the reason

given above, it is unnecessary to consider and determine the

reason assigned upon the basis of the report as referred to

above a new trial upon the ground of newly discovered evidence.

The judgment is reversed and the cause remanded.

REVEREND AND HONORABLE

March Term, 1912, No.

129 - 18160.

HERMAN L. WOLFF, for the use
of Barnett Zollo,
Defendant in Error,

vs.

ERNEST M. CROSS, doing business
as E. M. CROSS & CO.,
Plaintiff in Error.

182 I.A. 454

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

Ernest M. Cross, doing business as E. M. Cross & Co., prosecutes this writ of error to review the record of a proceeding in the Municipal Court, wherein there was a finding and judgment against him in favor of defendant in error for \$366.92.

The statement of claim filed by defendant in error is for damages occasioned by the failure of plaintiff in error to deliver 160 cases of eggs according to quality, as per inspection and sample, purchased by defendant in error September 14, 1910. The affidavit of merits and claim of set off filed by plaintiff in error states that defendant in error bought of plaintiff in error 160 cases of eggs for \$1,128., and paid therefor on account \$341.42; that plaintiff in error procured for defendant in error a loan of \$800 on said eggs; that defendant in error failed to pay said loan at maturity and plaintiff in error was obliged to pay the same and to sell said eggs on account of defendant in error; that plaintiff in error thereby sustained a loss of \$246.40 on the transaction; that defendant in error was also indebted to plaintiff in error in the sum of \$6 for 2 other cases of eggs purchased from plaintiff in error.

It is uncontroverted that negotiations between defendant in error and one Miller, who was the sales agent of plain-

125 - 18180

18214.454

ERROR NO

WHITFIELD COURT

OF CHICAGO

HERMAN L. HOLLY, for the use
 of GEORGE TOLIN,
 Defendant
 vs.
 HERBERT A. GROSS, doing business
 as H. A. GROSS & CO.,
 Plaintiff in Error.

MR. JUSTICE BAUM, delivered the opinion of the court.

Ernest M. Gross, doing business as E. M. Gross & Co.,
 presented this writ of error to review the record of a pro-
 ceeding in the Municipal Court, wherein there was a finding
 and judgment against him in favor of defendant in error.
 The case was
 No. 125.

The statement of claim filed by defendant in error
 is for damages occasioned by the failure of plaintiff in error
 to deliver 180 cases of eggs according to quality, as per in-
 spection and sample, purchased by defendant in error September

12, 1910. The affidavit of service and claim of not paid
 filed by plaintiff in error states that defendant in error
 bought of plaintiff in error 180 cases of eggs for \$1,125.
 and paid therefor on account \$251.12; that plaintiff in error
 returned for defendant in error a loss of \$800 on said eggs;
 that defendant in error failed to pay said loss of \$800;
 and plaintiff in error was obliged to pay the same and to
 will said eggs on account of defendant in error; that plain-
 tiff in error thereby sustained a loss of \$324.40 on the
 transaction; that defendant in error was also interested in
 plaintiff in error in the sum of \$5 for a share of the
 loss sustained from plaintiff in error.

It is contended that negotiations between defen-
 dant in error and one Miller, who was the sales agent of plain-

tiff in error, which commenced about September 12, 1910, culminated on September 14th in the purchase by defendant in error from plaintiff in error of 160 cases of eggs at 23 cents per dozen; that certain cases of eggs then in the store of plaintiff in error were inspected by defendant in error and others acting for him and found to be fresh and of good grade. Witnesses called on behalf of defendant in error testified that the 160 cases of eggs in question were then in the store of plaintiff in error and that Miller said the eggs were all strictly fresh, while witnesses called by plaintiff in error testified that there were then only 56 cases of the lot of eggs in question in the store and that the remainder of the lot consisting of 160 cases were on the selling floor of the warehouse operated by the Chicago Cold Storage Warehouse Company; that the eggs which were inspected by defendant in error in the store were part of the same lot which was then in the warehouse; that upon the sale of the 160 cases to defendant in error they were placed in cold storage in the same warehouse, a warehouse receipt was issued therefor and a loan of \$800 was procured by plaintiff in error for the use and benefit of defendant in error.

If all the eggs that were purchased by defendant in error were in the store of plaintiff in error at the time of the purchase, it is certain that the 160 cases of eggs which were thereafter placed in storage by plaintiff in error for the account of defendant in error were of a different lot and inferior quality, because it is clearly established by the evidence that no eggs were received at the warehouse from the store of plaintiff in error during September, 1910. The controlling question of fact in the case, therefore, is whether or not Miller, acting for plaintiff in error, substituted other and different eggs for those actually purchased by defendant in error. While the evidence bearing upon this

with in error, which was shown about September 12, 1910, and
eliminated on December 15th in the warehouse by defendant in error
Carm Plaintiff in error of 120 cases of eggs at 25 cents per
dozen; that certain cases of eggs taken in the store of plain-
tiff in error were introduced by defendant in error and others
sent for him and found to be fresh and of good grade. The
court called on behalf of defendant in error testified that
the 120 cases of eggs in question were taken in the store of
plaintiff in error and that Miller said the same were all
definitely fresh, while witnesses called by plaintiff in error
testified that there were then only 80 cases of the lot of
eggs in question in the store and that the remainder of the
lot consisting of 120 cases were on the selling floor of the
warehouse operated by the Chicago Cold Storage Company. The
court said the eggs which were introduced by defendant in
error in the store were part of the same lot which was taken
in the warehouse; that upon the sale of the 120 cases to
defendant in error they were placed in cold storage in the
same warehouse, a warehouse receipt was issued therefor and
a loan of \$200.00 was procured by plaintiff in error for the same
and benefit of defendant in error.
It was the eggs that were purchased by defendant
in error were in the store of plaintiff in error at the time
of the purchase, it is certain that the 120 cases of eggs which
were thereafter placed in storage by plaintiff in error for the
purpose of defendant in error were of a different lot and
inferior quality, because it is clearly established by the
evidence that no eggs were received at the warehouse from the
store of plaintiff in error until December, 1910. The
controlling question of fact in the case, therefore, is whether
or not Miller, when for plaintiff in error, introduced
other and different eggs for those actually purchased by
defendant in error. While the evidence tends to show that

issue is closely conflicting, we cannot say that the finding of the trial court was unwarranted. If the same conclusion had been arrived at by a jury, we could not say that the verdict was manifestly wrong.

It is insisted that the court improperly permitted the witness, Tobin, to interpret the report of an inspection of the eggs in question made by an employee of the Chicago Butter and Egg Board. The evidence was incompetent, but harmless, because an examination of the report verified the statement of the witness as to the reported result of such inspection.

While the testimony of Tobin, as to the identity of certain eggs examined by him, was based upon hearsay, and should have been excluded, the eggs referred to by him were identified by the witness, Zuckerman, and there is no counter-vailing evidence as to their identity. No harm resulted from the ruling.

There is no prejudicial error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

There is already conflicting evidence as to the identity of the person who was arrested at the time of the shooting. It is the opinion of the jury that the person who was arrested at the time of the shooting was the same person who was arrested at the time of the shooting.

It is stated that the person who was arrested at the time of the shooting was the same person who was arrested at the time of the shooting. The evidence is that the person who was arrested at the time of the shooting was the same person who was arrested at the time of the shooting. The evidence is that the person who was arrested at the time of the shooting was the same person who was arrested at the time of the shooting.

While the testimony of the person who was arrested at the time of the shooting is that the person who was arrested at the time of the shooting was the same person who was arrested at the time of the shooting, the evidence is that the person who was arrested at the time of the shooting was the same person who was arrested at the time of the shooting. The evidence is that the person who was arrested at the time of the shooting was the same person who was arrested at the time of the shooting.

There is no prejudicial error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

234 - 18373.

WILLIAM BUHS,
Plaintiff in Error,
vs.
WILLIAM B. AUSTIN,
Defendant in Error.

182 I.A. 455

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

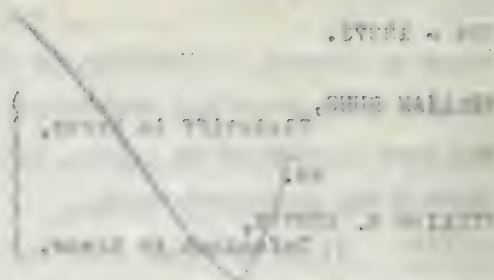
MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

In a suit brought in the Municipal Court by William Buhs against William B. Austin to recover certain rents collected by the latter, a trial by the court without a jury resulted in a finding and judgment against the plaintiff who prosecutes this writ of error to reverse such judgment.

The agreed statement of facts is as follows: That, on July 30, 1906, William Buhs and Mary Buhs, his wife, executed their trust deed of certain premises to William B. Austin, as trustee to secure the payment of twelve notes, aggregating the sum of \$235; that the said Buhs and wife at the same time, and for the same consideration, also executed and delivered their certain instrument assigning the rents of said premises to said Austin; that there was a prior encumbrance on said premises in the sum of \$1,200; that said Austin afterwards took possession of said premises and collected the rents thereof and used all of the same in payment of expenses connected therewith and in the payment of taxes, interest on the said prior encumbrance, etc.; that said premises became vacant and unoccupied during the latter part of the year, 1908, and remained vacant and unoccupied until August 9, 1909; that said Austin used every reasonable effort to rent the same during said vacancy, but without avail; that said Austin, during the latter part of the year, 1908, and up to August 9, 1909, was unable to find said Buhs or his wife, although he made diligent inquiry for that pur-

1821.A.455

THE
COURT
OF
COMMONS



THE COURT OF COMMONS

In a bill of complaint filed in the Court of Commons, the plaintiff, William Bingham, claims to be the owner of a certain piece of land, and that the defendant, William Bingham, is in possession of the same. The plaintiff claims that the defendant is in possession of the land by virtue of a certain deed, and that the plaintiff is entitled to the land by virtue of a certain deed. The defendant claims that the plaintiff is not entitled to the land, and that the defendant is in possession of the land by virtue of a certain deed. The Court of Commons has heard the case, and has decided in favor of the plaintiff. The plaintiff is entitled to the land, and the defendant is to be removed from the land. The Court of Commons has also ordered that the plaintiff be paid the costs of the suit.

pose; that on November 30, 1908, one Samuel L. Weiser, who was then and for a considerable time prior thereto, had been the owner of the unpaid portion of the said notes, secured by the said trust deed, filed his bill to foreclose said trust deed; that such cause proceeded to a decree of sale entered May 18, 1909, and a sale of the premises in said decree mentioned was made on June 11, 1909, for the full amount found due by said decree, interest and costs and in full satisfaction thereof; that Samuel L. Weiser, the complainant in said suit, was the purchaser at such sale and received a certificate of sale, and that thereafter and on September 12, 1910, a deed of said premises was issued under said sale; that said William Buhs was the owner of said equity of redemption; that sometime about the middle of May, 1909, the said William B. Austin, made and contracted for repairs to the amount of \$318 upon the building located on the premises described in said trust deed; that at the time such repairs were made the said premises were untenable and were gradually becoming dilapidated; that each and all of the said repairs were necessary to preserve said building and to put same in a tenable condition; that said repairs were made and that said Austin paid therefor the sum of \$318, \$200 being paid June 30, 1909, and the balance in July, 1909, which amount was a fair and reasonable sum for the same; that said repairs were commenced about May 15, 1909, and completed about July 3, 1909; that afterwards and on August 9, 1909, the said Austin rented said building at a monthly rent of \$15, which was a fair and reasonable rent therefor as then repaired by said Austin; that said Austin received rent from said premises during the period of redemption from said sale, from August 9, 1909, to and including September 11, 1910, a total gross rent of \$195, out of which rental he was compelled and did pay real estate agent's commission amounting

that on November 20, 1908, one Samuel L. Webster, who was then and for a considerable time prior thereto, had been the owner of the unpaid portion of the said notes, secured by the said first deed, filed his bill to foreclose said first deed; that such course proceeded to a decree of sale, entered May 12, 1909, and a sale of the premises in said estate mentioned was made on June 11, 1909, for the full amount found due by said notes, interest and costs and in full satisfaction thereof; that Samuel L. Webster, the owner of said bill, was the purchaser at such sale and received a certificate of sale, and that thereafter and on September 12, 1910, a deed of said premises was issued under said sale; that said William Fiske was the owner of said equity of redemption; that sometime about the middle of May, 1917, the said William F. Austin, alone and undisturbed, did transfer to the amount of \$115 upon the building located on the premises described in said first deed; that at the time said repairs were made the said premises were untenable and were practically becoming dilapidated; that each and all of the said repairs were necessary to preserve said building and to put same in a tenable condition; that said repairs were made and that said William Fiske Austin the sum of \$115, being paid June 20, 1909, and the balance in July, 1909; that said repairs were commenced about May 10, 1917, and completed about July 5, 1918; that alterations and an improvement, the said Austin rented said building at a monthly rent of \$15, which was a fair and reasonable rent thereafter as then reported by said Austin; that said Austin received rent from said premises during the period of restoration from said date, from August 2, 1909, to and including September 11, 1910, a total gross rent of \$192, out of which rental he was entitled and did pay real estate agents' commission amounting

to \$3.35, water taxes on said premises the sum of \$12.12, and carpenter work and plumbing \$32.01; that such payments were necessary in order to keep said premises rented and in repair; that the net amount received by said Austin as rent of said premises during said period of redemption was \$157.62; that said Austin also paid during said period of redemption for interest due upon the first mortgage on said premises as follows: June 12, 1909, \$36.00; July 6, 1909, \$36.00; Jan. 3, 1910, \$36.00; July 8, 1910, \$36.00.

The instrument whereby plaintiff in error assigned the rents of said premises to defendant in error also designated defendant in error the attorney in fact of plaintiff in error with power "to collect all of said avails, rents, issues and profits arising or accruing at any time hereafter, and all now due or that may hereafter become due under each and all of the leases or agreements, written or verbal, existing or to hereafter exist as to said premises****and to rent, lease or let any portion of said premises to any party or parties within his discretion, hereby granting full power and authority to exercise all of the rights, privileges and powers herein granted at any and all times hereafter without notice to the grantors herein, their executors, administrators and assigns, and further, with power to use and apply said avails, issues and profits in the payment of any indebtedness or liability of the undersigned to the said Austin or his clients, due or to become due, or that may hereafter be contracted, and also to the payment of all expenses and the care and management of said premises, including taxes and assessments, and the interest on incumbrance, as may in said attorney's judgment be deemed proper and advisable."

It is well settled that where at a foreclosure sale the mortgaged premises are sold for the full amount of the mortgage debt, interest and costs the mortgage is thereby

of \$10,000, which takes on said premises the sum of \$10,000, and
thereafter with and including \$10,000; that such payments were
necessarily in order to keep said premises rented and in repair;
that the net amount received by said lessee in the sum of said
payments during said period of redemption was \$10,000; that
said lessee also paid during said period of redemption the
interest due upon the first mortgage on said premises as
follows: from 1st, 1921, to 1st, 1922, \$100.00; from 1st, 1922,
to 1st, 1923, \$100.00; and from 1st, 1923, to 1st, 1924, \$100.00.

The statement thereby placed in error as to the
facts of said premises to defendant in error also design-
ated defendant in error the attorney in fact of said
lessee with power to collect all of said rents, profits,
interest and profits arising or accruing at any time hereafter,
and if not in that way hereafter between the under each
and all of the leases or agreements, written or verbal, ex-
isting or to hereafter exist as to said premises, and to
that, lease or let any portion of said premises to any party
or parties within his discretion, hereby granting this power
and authority to exercise all of the rights, privileges and
powers herein granted to any and all these hereafter without
notice to the grantors herein, their executors, administrators,
and assigns, and further, with power to sue or sue with
several, jointly and severally in the payment of any and all
or liability of the undersigned to the said lessee on his
obligations, and on or before 1st, 1924, at that day hereafter to be
determined, and also to the payment of all expenses and costs
and management of said premises, including taxes and assess-
ments, and the interest on indebtedness, as may in said notice
be so designated by lessee proper and advisable."

It is well settled that there is a leasehold estate
in the premises and that the full amount of the
rent due, interest and costs the lessee is liable

satisfied and the owner of the equity of redemption is entitled to the possession of the premises and to the rents and profits accruing therefrom during the period of redemption. Raigh v. Carroll, 208 Ill., 579; Schaeppi v. Bartholomae, 217 Ill., 105. Plaintiff in error invokes this rule of law in support of his claim to the rent in question and insists that, as a receiver, if one had been appointed by the court in the foreclosure proceeding, would have been required to turn over to plaintiff in error the rent received during the period of redemption, the rent collected by defendant in error during such redemption period must be held to belong to plaintiff in error.

The powers conferred by plaintiff in error upon defendant in error by the instrument assigning the rents and constituting defendant in error the attorney in fact of plaintiff in error are not limited to be exercised with reference alone to the trust deed which was foreclosed, but are sufficiently broad in their scope to authorize defendant in error to apply the rents collected by him in the payment of expenses incurred in the care and management of the premises, including taxes and assessments and for interest on the prior incumbrance. That the rent collected by defendant in error was so applied by him is not controverted.

Furthermore, the action of assumpsit for money had and received is equitable in its nature and lies to recover money which in equity and good conscience the defendant ought to refund. Supervisors v. Menny, 56 Ill., 160; Fay v. Slaughter, 194 Ill., 157.

It is admitted that but for the money expended by defendant in error for necessary repairs on the premises in question, the premises would have been untenable and no rent could have been received therefor, and it would be

entitled and the owner of the equity of redemption is entitled to the possession of the premises and to the rents and profits accruing thereon during the term of redemption. Wright v. Garret, 208 Ill. 475; Garrett v. Wright, 217 Ill. 108. Plaintiff is also entitled to the value of his share in the premises and interest thereon, as a receiver, if one has been appointed by the court in the foreclosure proceedings, and has been required to hand over to plaintiff in error the cash received during the period of redemption, the cash collected by defendant in error being such redemption period must be paid to plaintiff in error.

The powers conferred by plaintiff in error upon defendant in error to the instrument executed by the latter and authorizing defendant in error the attorney in fact of plaintiff in error are not limited to be exercised with reference to the cash and interest received, but also to the collection of taxes and assessments and for interest on the other indebtedness. The cash collected by defendant in error was so applied by him as not to be considered.

Furthermore, the action of defendant in error to receive and collect is applicable to the rents and profits and interest which is due to the plaintiff in error and to the interest on the cash and interest received by him. Wright v. Garret, 208 Ill. 475; Garrett v. Wright, 217 Ill. 108.

It is admitted that but for the money collected by defendant in error for necessary repairs on the premises in question, the premises would have been untenable and no doubt could have been received earlier, and it would be

manifestly inequitable and contrary to good conscience to permit plaintiff in error to realize a profit upon the expenditures by defendant in error, whereby alone rent was receivable, the recovery of which by plaintiff in error would result in a loss to defendant in error.

There is no merit in the claim of plaintiff in error and the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

• 1 •

The recovery of which by limitation in time would

be it in a loss or defendant's error.

There is no writ in the claim of plaintiff in

1. *Journal of the American Medical Association*, 1997; 277: 1039-1043.

1912, 1913, 1914

259 - 18298.

JOHN CALDON,
Plaintiff in Error,

vs.

NATIONAL MALLEABLE CASTINGS COMPANY,
Defendant in Error.

ERROR TO

SUPERIOR COURT,

COCK COUNTY.

182 I.A. 458

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

To the amended declaration in an action in case, filed by plaintiff in error in the Superior Court, the defendant in error interposed a general and special demurrer, which were sustained by the court, and plaintiff in error, having elected to abide his said declaration, judgment was rendered against him in bar of his action and for costs.

The declaration in question contains five counts. The first count charges that on, to-wit: April 22, 1907, defendant in error was possessed of and using in and about its business a certain factory or workshop in the City of Chicago; that at the time and place aforesaid plaintiff in error was a hired servant of defendant in error, employed as a laborer, and as such servant was ordered by defendant in error to work outside of the scope of his employment, upon certain work in which he was wholly unskilled, and with a certain wrench which was too small to put in a certain screw, and liable to slip off said screw and cause plaintiff in error to lose his balance and fall from an elevated scaffold upon which he was working, and which work required an assistant to enable plaintiff in error to perform said work with safety to himself and to prevent his losing his balance and falling from the scaffold, and was ordered by defendant in error to do the aforesaid work, without warning him of the dangers arising from the insufficient tools and insufficient

1821 A. 428

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

To the Honorable Association in an action in equity,
brought by Plaintiff in error in the Superior Court, the inter-
dict is since proposed a general and a special remedy, which
were sustained by the court, and Plaintiff in error, having
elected to abide his said declaration, judgment was rendered
against him in favor of his action and for costs.

The declaration in question contains the following:

The first count charges that on, to-wit: April 1st, 1887,
defendant in error was possessed of and using in and about
the premises a certain factory or workshop in the City of
Chicago; that at the time and place aforesaid Plaintiff in
error was a hired servant of defendant in error, employed as
a laborer, and as such servant was ordered by defendant in
error to work outside of the scope of his employment, upon
certain work in which he was totally unskilled, and which was
certain trench which was not well to put in a certain narrow

and liable to slip off said work and cause Plaintiff in
error to lose his balance and fall from an elevated position
upon which he was working, and which work required an exor-
dinary amount of Plaintiff in error to work on said work with
safety to himself and to prevent his losing his balance and
falling from the scaffold, and was ordered by defendant in
error to do the aforesaid work, Plaintiff claims that he is
damaged arising from the negligent acts and omissions

number of men, and without any instruction as to how to do the work with safety to himself, all of which was known to defendant in error or could have been known by the exercise of ordinary care, but the dangers of which were unknown to plaintiff in error; that at the time and place aforesaid defendant in error carelessly, negligently, wrongfully and improperly failed to use reasonable care to provide plaintiff in error with a reasonably safe place to work, in this, that it carelessly and negligently failed to warn plaintiff in error of the dangers attending said work as aforesaid, and by reason of the carelessness and negligence of defendant in error as aforesaid, the tool with which plaintiff in error was then and there working became detached from the said work while plaintiff in error, in the exercise of all due care and caution for his own safety, was so, in obedience to the orders of defendant in error as aforesaid, thereby and by means of the premises plaintiff in error was precipitated with great force and violence down to and upon the floor, by means whereof plaintiff in error was injured, etc.

The second count is like the first, except that it charges that defendant in error carelessly and negligently failed to instruct plaintiff in error how to perform the said work with safety to himself. The third count is like the second, except that it charges that defendant in error carelessly and negligently failed to provide plaintiff in error with tools which were reasonably sufficient and safe for the work which he was then and there doing as aforesaid. The fourth count is the same as the preceding counts, except that it charges that at the time and place aforesaid, defendant in error carelessly, negligently, wrongfully and improperly failed to use reasonable care to provide plaintiff in error with a reasonably safe place to work, in this, that it carelessly and

... of men, and without any intention as to how to do
... with safety to himself, all of which was known to
... in error or could have been known by the exercise
... care, but the danger of which was known to
... in error; that at the time and place aforesaid
... in error, negligently, recklessly, wantonly and
... to the defendant's negligence, recklessness, wantonness
... with a reasonably safe place to work, in fact, that
... and negligently failed to work safely in
... of the dangers attending work as aforesaid, and by
... of the carelessness and negligence of defendant in
... the fact with which plaintiff in error
... and there working became detached from the work and
... in error, in the exercise of all due care and
... for his own safety, was so, in obedience to the orders
... in error as aforesaid, thereby and by means of
... in error was precipitated into great
... and violence down to and upon the floor, by means whereof
... in error was injured, etc.

The second count is like the first, except that it
... that defendant in error carelessly and negligently
... in error how to perform the said
... to himself. The third count is like the
... except that it charges that defendant in error care-
... and negligently failed to provide plaintiff in error
... which were reasonably sufficient and safe for the
... which he was then and there doing as aforesaid. The
... count is the same as the preceding counts, except that
... at the time and place aforesaid, defendant in
... negligently, recklessly, wantonly and

to use reasonable care to provide plaintiff in error with a
... in fact, that it carelessly and

negligently failed to provide a sufficient number of men to assist and work with plaintiff in error in performing the said work as aforesaid. The fifth count is the same as the former counts, except that it charges that at the time and place aforesaid defendant in error carelessly, negligently, wrongfully and improperly failed to use reasonable care to provide plaintiff in error with a reasonably safe place to work, in this, that it carelessly and negligently ordered plaintiff in error to work outside of the scope of his employment, while he was so unskilled, uninstructed and unwarned as aforesaid.

It may be conceded that, if the sufficiency of this declaration was first questioned after a verdict, it could properly be held to be sufficient, but a different rule is to be applied when it is tested by a general and special demurrer, and it is to be construed against the pleader. Sargent Co. v. Baublis, 215 Ill., 428.

The allegation in each count of the declaration that plaintiff in error was ordered to work outside of the scope of his employment upon certain work in which he was wholly unskilled and with a certain wrench which was too small to put in a certain screw is defective and insufficient. The statement that plaintiff in error was ordered to work outside of his employment, unaccompanied by any statement, as to the character of the work he was ordered to perform, is merely the conclusion of the pleader. The designation of the work and of the instrumentalities involved as "certain" merely is too vague and indefinite and the same may be said as to the allegation respecting the consequences following the use of the instrumentalities in performing the work. The allegation that the work required an assistant to enable plaintiff in error to perform the same with safety is also the mere conclu-

sion of the pleader. As bearing upon the question of assumed risk, the declaration fails to negative such knowledge of the danger as plaintiff in error might have acquired in the exercise of ordinary diligence.

For the reasons stated the demurrer to the declaration and to each count thereof was properly sustained and the judgment is affirmed.

JUDGMENT AFFIRMED.

aim of the present, in which the position of the
also, the Commission will be able to make a
which is likely to be of great interest to the
of ordinary citizens.

For the reasons stated in the preceding
and to each of the various subjects and the
is stated.

JUDICIAL REVIEW.

290 - 18330.

GEORGE C. JOHNSON,
Defendant in Error,
vs.
JOHN E. KURZENKNABE,
Plaintiff in Error.)

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

182 I.A. 459

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

Defendant in error brought suit in the Municipal Court against plaintiff in error to recover \$130, being 20% commission on \$650, the price of a harp sold by the Rudolph Wurlitzer Co., a corporation, through plaintiff in error, its sales agent, to Viola G. Miller, and for damages for breach of an implied warranty by plaintiff in error that he had authority on behalf of said corporation to contract for the payment of said 20% commission. A trial resulted in a finding and judgment against plaintiff in error for the amount claimed.

In October, 1910, Miss Miller, who was contemplating the purchase of a harp, mentioned the subject to defendant in error who suggested to her that he might be able to save her some money by securing a commission upon the sale, if she would permit him to negotiate the transaction, and Miss Miller assented to such proposal. Defendant in error then opened negotiations with plaintiff in error and such negotiations resulted in the purchase by Miss Miller of a harp from the Wurlitzer Co. for \$300, with the privilege to the purchaser of thereafter exchanging the same for a new model harp at an increased price. Thereafter, upon the payment of an additional \$350, and the return of the harp first purchased, Miss Miller procured the said new model harp. The Wurlitzer Co., having disclaimed the authority of plaintiff in error to contract for the payment of a commission to defendant in error,

1821.A.459

CHARGE OF LITIGATION
IN THE CIRCUIT COURT
OF THE DISTRICT OF COLUMBIA
IN THE MATTER OF THE ESTATE OF
JOHN E. HARRINGTON
DECEASED

ERRORS TO
MUNICIPAL COURT
IN CHICAGO.

1821.A.459

THE JUDICIAL BRANCH WILLING THE OPINION OF THE COURT.

Defendant in error brought suit in the Municipal Court against plaintiff in error to recover \$150, being 50% commission on \$300, the price of a hat sold by the Municipal Hatting Co., a corporation, through plaintiff in error, its sales agent, to Viola G. Miller, and for damages for breach of an implied warranty by plaintiff in error that he had actually on behalf of said corporation so consigned for the payment of said 50% commission. A trial resulted in a judgment against plaintiff in error for the amount claimed.

In October, 1910, Mrs. Miller, who was commissioning the purchase of a hat, requested the subject to deliver in error who suggested to her that he might be able to save her some money by securing a commission upon the sale, if she would permit him to negotiate the transaction, and Mrs. Miller assented to such proposal. Defendant in error then obtained negotiations with plaintiff in error and such negotiations resulted in the purchase by Mrs. Miller of a hat from the Municipal Hatting Co. for \$300, with the privilege to the corporation of thereafter ordering the same for a new model hat at an increased price. Thereafter, upon the payment of an amount of \$150, and the return of the hat (not purchased, Mrs. Miller procured the said new model hat. The Municipal Hatting Co. having assigned the authority of plaintiff in error to conduct for the payment of a commission to defendant in error,

the latter instituted this suit against plaintiff in error, as heretofore stated.

Defendant in error testified unequivocally that plaintiff in error agreed to allow him a commission of 20% on the selling price of a harp purchased by Miss Miller, and the evidence tends to show that the claim of defendant in error that such an agreement had been entered into with plaintiff in error, presuming to act for the Wurlitzer Co., was the main inducement that prompted Miss Miller to purchase a harp from said company. While plaintiff in error denies that he made any such agreement with defendant in error, or that the payment of any commission to defendant in error was contemplated, the facts and circumstances in evidence, together with the testimony of Miss Miller, are corroborative of the testimony of defendant in error, and the trial court was not unwarranted in finding that the agreement for the payment of a commission to defendant in error was made by plaintiff in error as claimed, and that plaintiff in error represented that he had authority to make such agreement.

Whether or not defendant in error was precluded from recovering the commission in question upon the ground that he had acted in the capacity of a broker without having first obtained a broker's license, as required by the Municipal Code, does not appear to have been suggested in the trial court, and the question can not be raised for the first time in this court.

To defeat a recovery plaintiff in error invokes the rule that a broker may not recover a commission where he has been secretly acting for the buyer, while ostensibly acting for the seller. This is a well established and salutary rule, but it can have no application in the case at bar, because the evidence tends to show that defendant in error dis-

The latter instructed this suit against plaintiff is error,
as indicated herein.

Defendant in error testified untruthfully that

plaintiff in error agreed to allow him a commission of 10%

on the selling price of a large purchase of Mrs. Miller, and

the evidence tends to show that the claim of defendant is

correct, and that an agreement had been entered into with

plaintiff in error, promising to act for the Whittier Co.,

and the said instrument that procured Mrs. Miller to pur-

chase a large tract of land.

Defendant in error was not authorized to act for

plaintiff, or that the payment of any commission to defendant

is either well established, the facts and circumstances in

relation thereto with the testimony of Mrs. Miller, are

inconclusive on the testimony of defendant in error, and the

first issue was not maintained in finding that the agreement

was the payment of a commission to defendant in error was made

by plaintiff in error as claimed, and that plaintiff in error

represented that he had authority to make such agreement.

Whether or not defendant in error was procured from

procuring the commission in question upon the ground that he

was acting in the capacity of a broker without having first

obtained a broker's license, as required by the Municipal Code,

does not appear to have been suggested in the trial court, and

the question can not be raised for the first time in this

appeal.

To refuse a recovery plaintiff in error is wrong the

rule that a broker who not received a commission when he has

been secretly acting for the buyer, while ostensibly acting

for the seller. This is a well established rule.

rule, but it can have no application in the case at bar, be-

cause the evidence tends to show that defendant in error dis-

closed the fact to plaintiff in error that the commission was to belong to Miss Miller, and that plaintiff in error consented to such arrangement for the purpose of effecting a sale of a new harp which had just been placed upon the market. The element of bad faith on the part of defendant in error was wholly lacking.

Complaint is made of the refusal of the court to permit a stenographer who had reported the testimony of defendant in error upon a former trial to testify to the version which defendant in error then gave of the transaction in question and of his several conversations with plaintiff in error. Counsel for plaintiff in error upon the cross examination of defendant in error sought to lay a foundation for the introduction of impeaching evidence, but in that connection the record discloses that the effort was directed to matter which was wholly immaterial, and it does not appear that any impeachment of defendant in error was attempted as to any material matter. While the trial court gave a wrong reason for its ruling in excluding the proffered testimony, the ruling was right, because so far as the record shows such proffered testimony related to immaterial matters.

The record is free from prejudicial error and the judgment is affirmed.

JUDGMENT AFFIRMED.

Alford the fact to plaintiff in error that the defendant was
to belong to Miss Miller, and that plaintiff in error consented
to such arrangement for the purpose of effecting a sale of a
new house which had just been placed upon the market. The
consent of her father on the part of defendant in error was
plainly lacking.

Complaint is made of the refusal of the court to
admit a stenographer and had reported the testimony of
defendant in error as a "false story" in violation of the
rights which defendant in error was entitled to the
trial of the case and of his several conversations with plain-
tiff in error. Counsel for plaintiff in error upon the same
testimony of defendant in error sought to lay a foundation
for the introduction of impeaching evidence, but in that
instance the court refused and that refusal is
in error which was wholly immaterial, and it does not appear
that any impeachment of defendant in error was attempted as
to any material matter. While the trial court gave a wrong
reason for the ruling in excluding the proffered testimony,
the ruling was right, because to lay it as the second error
was proffered testimony related to immaterial matters.
The court is not responsible for the error and the
defendant is entitled.

REVEREND FATHER

209 @ 17740.

CHRIS SCHMIDTZ,
Defendant in Error,)
vs.)
ERNEST TOSETTI BREWING COMPANY,
a corporation,)
Plaintiff in Error.)

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

182 I.A. 469

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Defendant in error, Chris Schmitz, recovered a judgment of \$375 as damages for injuries received by a kick from a vicious and dangerous horse known as "The Bitch", while employed by plaintiff in error as a driver. In his statement of claim it was charged that plaintiff in error's foreman ordered him to drive the horse to a certain wagon and assured him that it was all right and not vicious or dangerous, well knowing, or in the exercise of ordinary care should have known, that the horse was vicious and dangerous.

It is contended here by the plaintiff in error, Ernest Tosetti Brewing Company, (1) that defendant in error failed to prove a case for the consideration of the jury, that he had full and complete knowledge of the danger of which he complained and was not misled by any order or assurance of safety by plaintiff in error, and, therefore, assumed the risk; (2) that the court erred in its instructions in stating the law of the case and, therefore, should have granted a new trial.

Defendant in error testified that on the night before the injury he asked the barn boss of plaintiff in error what horse he should drive next morning, and that the boss said, "Take the Bitch out"; that defendant in error then said, "Maybe he make me trouble, maybe he kick in the single"; that the barn boss replied in a rough tone of voice, "He not do

1881 A. 469

THE COURT IN THE MATTER OF THE ESTATE OF THE DECEASED

Testimony in error, the witness, deceased, testified that he was damaged for injuries received by a fall from a wagon and harness horse known as "The Lion". This witness was employed by plaintiff in error as a driver. In his statement of claim it was charged that plaintiff in error's witness ordered him to drive the horse to a certain wagon and assured him that it was all right and not vicious or dangerous, well knowing, or in the exercise of ordinary care, should have known, that the horse was vicious and dangerous. It is contended here by the plaintiff in error,

Firstly, that the witness in error, (1) did not know in error that to prove a case for the consideration of the jury, that as and full and complete knowledge of the danger of which he was apprised and was not aided by any other or assurance of safety by plaintiff in error, and, therefore, assumed the risk; (2) that the court erred in its instructions in stating the law of the case and, therefore, should have granted a new trial.

Defendant in error testified that on the night before the injury he said the word boss of plaintiff in error and, hence he should have been warned, and that the horse was, "Take the lion out"; that defendant in error then said, "Maybe he takes me around, maybe he takes in the single"; that the horse was replied in a rough tone of voice, "The boy is

nothing. I got no other horse for you. This horse is all right. Take him out." He further testified that he knew of the horse kicking when he worked it double, but that it did not "kick very high, not over the traces"; that he had never worked it single before, but had worked it double and had noticed that when he put a blanket on it, or the harness, it would start to kick, and knew that it was very nervous and would kick when any one touched it, and that it would kick when the harness was being taken off, but that he never saw or heard of the horse kicking any one before. The evidence thoroughly establishes the facts that the horse was a dangerous horse and liable to kick any one while using it, and that it had been owned and used at plaintiff in error's barn for thirteen years. The boss, Frank Hammerschmidt, testified that he had worked for plaintiff in error twenty years. He admits that he told defendant in error to use the horse in question the night before he was injured, but denies that defendant in error said anything to him about the horse kicking or that he made any suggestion of that kind. He also testified that defendant in error had driven the horse double and single before he was injured; that he, witness, never knew the horse to kick at all, and that he never heard any one refer to the horse as "the Bitch", and it was not called "the Bitch" at the stable. This witness was contradicted by a number of witnesses, some of whom testified for plaintiff in error. It was, therefore, a question for the jury whether or not the defendant in error fully and completely understood the danger and assumed the risk, or whether or not he was assured that the horse was reasonably safe for him to drive single after the order by the boss to him to drive it, and his assurance that it was all right. It is not an unreasonable conclusion to draw that a horse that is a kicker and dangerous when driven double, may

nothing. I got no other horse but you. This horse is all right. Take him out." He further testified that he knew at the horse kicking when he asked it to kick, but that it did not "kick very high, not over the fence"; that he had never noticed it single before, but had noticed it double and had noticed that when he put a blanket on it, or the blanket, it would kick in fact, and that it was not the same horse that when any one touched it, and that it would kick when the harness was being taken off, but that he never saw the kind of the horse kicking any one before. The evidence conclusively established the facts that the horse was a dangerous horse and liable to kick out one while driving it, and that it had been owned and used at Lincoln in either's party for this long time. The horse, Frank Hammettschmidt, testified that he had noticed the liability in error twenty years. He said that he would not attempt in error to use the horse in question the night before he was injured, but denied that statement. He said also anything to him about the horse kicking or that he made any suggestion of that kind. He also testified that statement in error had driven the horse double and single before he was injured; that he, witness, never saw the horse kick at all, and that he never heard any one refer to the horse as "the kick", and it was not called "the kick" at the time. This witness was contradicted by a number of witnesses, some of whom testified for plaintiff in error. It was, therefore, a question for the jury whether or not the defendant in error fully and completely misrepresented the danger and severity of the risk, or whether or not he was aware that the horse was reasonably safe for him to drive while after the order of the horse to him to drive it, and his testimony that it was all right. It is not an unreasonable conclusion to draw that a horse that is a kicker and dangerous when driven double, and

be reasonably gentle and safe for driving when driven single. While driving for plaintiff in error was a part of defendant in error's general duties as its employee, yet, his duty was not to drive this particular horse. The order to use the horse in question, therefore, was a specific order to use a certain instrumentality in a certain way, and not a general order, leaving it discretionary to the defendant in error as to the precise way and manner in which the order should be carried out as contended by plaintiff in error. Defendant in error had a right to assume, in the absence of knowledge to the contrary, that appellant would not order him to use a horse that was dangerous when used as directed, and we do not think we would be warranted, under the evidence, in finding that the order to use the horse and the assurance of the plaintiff in error that it was all right, did not mislead the defendant in error into believing that the horse was reasonably safe when worked single. The cause was, therefore, properly submitted to the jury. The Manufacturer's Fuel Co. v. White, 228 Ill., 137; Miller v. Kelley C. Co., 145 Ill. App., 452.

Defendant in error was not required by law to disobey his boss, or by obeying, to assume the hazard of obedience, unless the danger to which he was exposed was so imminent that a man of ordinary prudence would not have incurred the risk. The P. E. C. Co. v. Herath, 207 Ill., 576; C., B. I. & P. Ry. Co. v. Rathneau, 225 Ill., 278.

The cause must be reversed, however, for the giving of two instructions of similar import by the court to the jury, one of which reads thus:

"If you believe from all the evidence, that the plaintiff while in the employ of the defendant, was injured by reason of a danger that was actually known to him or by the exercise of ordinary care in his employment as defendant conducted his business, or which the plaintiff ought to have known or by the

...ly found and safe for driving when driven ...
...driving for plaintiff in error was a part of defendant's
...general duties as his employee, yet, his only ...
...to give this, particular answer. The order to use the
...in question, therefore, was a specific order to use a
...instrumentality in a certain way, and not a general
...leaving it discretionary to the defendant in error as
...the precise way and moment in which the order should be
...not as contemplated by plaintiff in error. Defendant
...had a right to assume, in the absence of knowledge
...that defendant would not order him to use a
...was dangerous when used as directed, and as to
...we could be warranted, under the evidence, in
...that the order to use the horse was the cause of
...in error that it was all right, did not ...
...defendant in error later believing that the horse was
...when worked single. The cause was, therefore,
...admitted to the jury. The Hannaford Trust Co.
...vs. The Hannaford Trust Co., 144 Ill.
...

Defendant in error was not required by law to dis-
...or by obeying, to assume the burden of ...
...which he was exposed was ...
...that a part of ordinary business would not have in-
...The P. & O. Co. v. ... 207 Ill., 576;
...The P. & O. Co. v. ... 207 Ill., 576.
The cause must be reversed, however, for the giving
of two instructions of similar import by the court to the
jury, one of which reads thus:

"If you believe from all the evidence, that the plaintiff
...in the employ of the defendant, and injured by reason of
...that was actually known to him as by his exercise of
...in his employment as defendant's employee, and that
...which the plaintiff sought to have known or by the
...

exercise of ordinary care on his part might have known, a sufficient length of time before he was injured to avoid the injury by quitting the service of the defendant, and he did not quit the service of the defendant, but plaintiff voluntarily continued in his employ with the knowledge of the danger resulting in the injury, then you must find the defendant not guilty, even though you may also believe from the evidence that the defendant was negligent in its duty toward the plaintiff, unless you further find from the evidence that the horse in question was a vicious horse and that the defendant knew, or in the exercise of ordinary care might have known it, and the plaintiff also knew of his vicious disposition and that the defendant acting through its foreman or vice-principal ordered said plaintiff to drive said horse and assured him that the horse was not vicious, and that the plaintiff acting under such order was misled and drove said horse and in so doing acted as an ordinarily prudent man would have acted under the same or similar circumstances."

The foregoing instruction does not accurately state the law. All of its parts are not harmonious and consistent with each other. If an employee knows the danger of using an appliance and knows that he is at all times exposed to danger when using it, and knows the danger is imminent and that he will be injured if he uses the appliance, it is not perceivable how he could be misled by any order or assurance of his boss or employer. With such knowledge on his part an employee would not be acting with reasonable care and prudence if he encountered the danger, although ordered to do so by his superior, because he would do so knowing that he would be injured. Where the employee knows the defect and knows the danger fully, no order from the master can change that knowledge. It is only where the servant is misled by an order or assurance of the master or some one standing in the master's place, that he can excuse himself from the assumption of the risk in using an appliance or instrumentality that he knows to be defective and apprehends that the use thereof might be attended with danger. E. J. & E. Ry. Co. v. Myers, 226 Ill., 358.

It is true that a knowledge of the defects of an appliance and even some knowledge of the attendant danger,

"I am being asked as an official witness under the name or initials of witnesses."

the law. All of its parts are not harmonious and consistent with each other. If an employee knows the danger of using a machine and knows that it is at all times exposed to danger, and holds it, and knows the danger is imminent and that it will be injured if he uses the machine, it is not necessary how he should be aided by any other or emergency of his boss or employer. With such knowledge on his part an employee would not be acting with reasonable care and, therefore, he is considered the danger, although ordered to do so by his superior, because he would be so knowing and he would be injured. There the employee knows the defect and knows the danger fully, as clear from the master and knows that injury. It is only where the servant is aided by an owner or insurance of the master or some one standing in the master's stead, that he can excuse himself from the responsibility of the work in using an appliance or instrumentality that he knows to be defective and apprehends that the use thereof might be

will not necessarily defeat a servant's right of recovery. If, however, the instrumentality is so obviously and immediately dangerous that a man of common prudence would refuse to use it, or if the servant knows that the instrumentality is so presently and immediately dangerous that he cannot reasonably hope to use it without being injured, the master cannot be held liable for the resulting injury, even in case of an order by him to use the instrumentality. A servant also has the right to assume, when ordered by his master to do a particular work in a particular way that he will not be exposed to unnecessary perils and to rest upon the implied assurance that there is no danger, unless he has knowledge to the contrary. Illinois Steel Co. v. Schymanowski, 182 Ill., 447; Anderaon Pressed B. Co. v. Sapkowski, 148 Ill., 573; Barnett & Record Co. v. Schlapka, 205 Ill., 476; Gundlach v. Schott, 192 Ill., 509.

When the master makes a promise to repair or to remove a defect, or gives a command to encounter a danger, the doctrine of assumed risk is thereby removed from further consideration. The real question then is one of contributory negligence on the part of the servant, and the extent of his knowledge of the danger is one of the elements that determines the questions of contributory negligence. In case of an order by the master where the servant obeys the order, the servant will not be defeated in his suit for damages, if injured by reason of his obeying the order, unless the danger was so great that an ordinarily prudent person would not have encountered the danger under the same or similar circumstances, or as also expressed, unless the danger was so imminent that a man of ordinary prudence would not have incurred the risk, which are questions for the jury upon proper instructions.

will not necessarily defeat a servant's right of recovery.
32, however, the instrumentality is so obviously and directly
the instrumentality that a duty of master protection would be
due it, or if the servant knows that the instrumentality is
presently and immediately dangerous that he cannot reasonably
be expected to use it without being injured, the master cannot
be held liable for the resulting injury, even in case of an
order by him to use the instrumentality. A servant who has
the right to remove, when ordered by his master to do so,
instrumentality from a particular place that he will not be ex-
posed to unreasonable injury and to read upon the limited
premises that there is no danger, unless he has knowledge
to the contrary. Lillie v. Lillie Co. v. Lillie Co., 100
114, 47; Anderson v. Lillie Co. v. Lillie Co., 100
175; Quincy v. Lillie Co. v. Lillie Co., 100 111, 112;
Quincy v. Lillie Co. v. Lillie Co., 100 111, 112.

Then the master who is promised to repair is to
prevent a defect, or gives a command to encounter a danger,
the liability of assumed risk is thereby removed from further
consideration. The real question then is one of contributory
negligence on the part of the servant, and the extent of his
knowledge of the danger is one of the elements that determine
the question of contributory negligence. In case of an
order by the master where the servant obeys the order, the
servant will not be held liable in his suit for damages, if he
takes no action of his own volition, unless the danger
was so great that an ordinarily prudent person could not have
reasonably expected the danger under the same or similar circumstances,
or as also expressed, unless the danger was so imminent that
a man of ordinary prudence could not have incurred the risk,
which are questions for the jury upon proper instructions.

C. & E. I. R. R. Co. v. Heeray, 203 Ill., 492; I. C. R. R. Co. v. Sporleder, 199 Ill., 184; The F. E. Car Co. v. Herath, 207 Ill., 576; Wells & French Co. v. Karacsynaki, 218 Ill., 149; Springfield Boiler Co. v. Parks, 222 Ill., 335.

By the instructions given in this case the jury were likely to be led to the belief that no amount of knowledge of the danger on the part of the defendant in error, not even knowledge of the disposition of the horse to kick in single, as well as in double, harness would defeat his recovery, and was, therefore, inaccurate and misleading to the jury.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

ber Term, 1911, No.

325 - 17861.

In the matter of the estate of
EMMA B. ARMSTRONG, deceased,
On appeal of
CHARLES E. ROLAND,
Appellant,

vs.

SAMUEL G. GRODESON, administrator
to collect of estate of E. B.
ARMSTRONG, deceased,
Appellee.

182 I.A. 482

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

This was a proceeding begun in the Probate Court, January 10, 1911, under Sections 81 and 82 of Chapter 3, Rev. Stat., ^{S. & C. 27 (32, 131)} in which it was charged by the administrator of Emma B. Armstrong, deceased, that Charles E. Roland, appellant, had in his possession personal property, moneys and effects as the proceeds of the sale of the Santa Barbara Hotel property, which was owned by said deceased in her life time, and that he refused to turn over said proceeds to said administrator. The Probate Court ordered him to pay the administrator the sum of \$1,920, subject to all liens and claims that might be proved against the estate, holding that his claim for commission should be probated, and on appeal and trial before the Circuit Court that court allowed him \$270 commission on the sale and found that he wrongfully withheld the sum of \$1,650 from said administrator, and ordered that he pay said sum, and that the administrator hold the same subject to all liens and claims that might be proved in the Probate Court.

On this appeal it is first contended by appellant that the court erred in advancing and trying this cause out of its regular order. Under Sec. 21 of our Practice Act, ^{J.A. 8558} the trial court has the right to advance and try a cause out of its regular order "for good and sufficient cause", and what is good and sufficient cause must be determined by that court.

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1821.A.482

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1821.A.482

MR. JUSTICE KENNEDY delivered the opinion of the court.

This case a proceeding begun in the Probate Court.

January 18, 1911, under Section 81 and 82 of Chapter 3,

Act No. 100, of the Statutes of the Commonwealth of Massachusetts.

Under the provisions of said Chapter 3, Section 81, the Probate Court

has in this case been authorized to receive and take

as the proceeds of the sale of the estate of the deceased, and

which was owned by said deceased in his life time, and

as referred to him over said proceeds in said will.

The Probate Court ordered him to pay the said proceeds

sum of \$1,700, subject to all liens and claims that might be

presented against the estate, holding that his claim for costs

should be deducted, and on appeal the said costs

the Probate Court had allowed him \$100, and on appeal

said and found that he was entitled to said sum of \$1,700

and said administrator, and ordered that he pay said sum

and that the administrator pay the said sum to all

and claims that might be proved in the Probate Court.

On this appeal it is first contended by the appellant

that the court erred in allowing and paying this sum

of its regular costs. Under Sec. 81 of Chapter 3,

the Probate Court has the right to receive and pay a sum

of its regular costs from the estate and said sum

is paid and sufficient costs must be allowed by the court.

The reviewing court will not interfere with the determination of the trial court in that particular unless there has been a clear abuse of that discretion. Seitzer v. Schlatt, 349 Ill., 416; Stanton Coal Co. v. Menk, 197 Ill., 389.

The court had ample reasons shown it for the advancing of the cause, as a showing was made that the estate would otherwise probably suffer a great loss by forced sales of property held by storage liens. Appellant also failed to show that he was prejudiced by the advancement or that he would be any better prepared to try the cause later. It is of no significance that one judge heard the cause and failed to decide it, and that the cause was very soon thereafter again tried and decided by another judge of the court. Appellee was entitled to a speedy and final disposition of the cause.

There is no merit in the contention of appellant that said Secs. 81 and 82 ^(99, 120, 121) only permit a "proceeding for the recovery of identical property", and that appellee was not entitled to a recovery of the proceeds of the sale of the hotel property. Appellant admits and testified under oath that the hotel property was transferred to him by Mrs. Armstrong shortly before her death by bill of sale for the sole purpose of selling the same and of paying her debts with the proceeds thereof. It was not a conveyance in fraud of creditors, but to better enable her to pay her creditors. Appellant had no right in the property ^{whatever} by the conveyance, except to discharge the trust imposed thereby and to retain his proper charges therefor. He sold the property for \$2,700, only paid a portion of the debts, and when questioned by the administrator about what he had done with the money, made conflicting statements regarding the same, and claimed to have paid out more than he had in fact paid, and was not even proceeding to

At the trial court is that particular which has been

...of the ... as a ... and ...

and the following is a list of the names of the persons who were present at the meeting on the 12th day of June, 1902.

that the hotel property was transferred to him by Mrs. Ann-
street shortly before her death by will in 1911 for the use

There was no claim in the vicinity of the Government, except

pay the remainder of the debts he claimed he was to pay. After her death the proceeds of the sale of the property properly and legally belonged to her estate and her administrator was entitled to recover it under said statute, less the amount paid by him on the debts of the deceased. Blair v. Bennett, 134 Ill., 78; Dinsmore v. Braseler, 104 Ill., 211.

Neither appellee nor appellant can be sustained in their objections to the court's allowance of a commission in the sum of \$270. The evidence clearly establishes the fact that there was an agreement on the part of Mrs. Armstrong to pay appellant ten per cent. commission on the sale of the property. Appellant was entitled to retain his commission without being forced to probate his claim. The Circuit Court, therefore, so far as appellee and appellant were concerned, properly adjusted and settled appellant's claim for commission in this suit, as well as that of appellee. The gross errors, therefore, are not sustained. He was not, however, entitled to two commissions, as the court was warranted in finding from the evidence that he had agreed to take part of his commission in cash and part in note on the Peavy sale of the property and refused to abide his agreement after the sale was agreed on between him and Mr. Peavy.

The court properly held also that, as to other debts to be paid out of the sale, the Probate Court should first pass on their validity, etc., and especially as appellant had not carried out his agreement with the deceased in paying the debts out of the proceeds of the sale. The judgment and orders of the court are affirmed.

AFFIRMED.

- 1 -

any the commission of the crime he claimed he was in jail. After
 and though the commission of the crime of the property generally
 and finally believed to have been the victim of the crime was
 entitled to recover if under this statute, under the statute
 held by him in the state of the defendant. State v. Smith.

194 E. 2d 101; Hinson v. Hinson, 194 E. 2d 101.

Further evidence was introduced and he testified in
 these objections to the court's findings of a commission in
 the case of 194. The evidence clearly established the fact
 that there was an agreement on the part of the defendant to
 get acquainted for her own. Commission on the side of the
 defendant. Defendant was entitled to retain his commission
 against being forced to execute his claim. The District Court
 sustained, so far as evidence and evidence were concerned,
 largely rejected and denied defendant's claim for commission
 to have been, as well as that of evidence. The other errors,
 therefore, are not sustained. He was not, however, entitled
 to get commission, as the court was entitled to find that
 the evidence that he had agreed to the part of the commission
 is based on the fact that he was in the family and
 witness to the agreement after the fact was agreed to

State v. Smith, 194 E. 2d 101.

The court properly held that, as to other errors
 in the trial of the case, the evidence clearly established
 that on the evidence, etc., and especially as defendant had
 not claimed the agreement with the deceased in paying the
 basis of the evidence of the case. The judgment and award
 of the court are affirmed.

RECEIVED

NATIONAL STEAM HEATING COMPANY,
a corporation,

Appellee,

vs.

WILLIAM C. MOULTON,

Appellant.

182 I.A. 483

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

National Steam Heating Company recovered a verdict and judgment of \$588.90 against William C. Moulton, appellant, as balance due upon a written contract for the installation of a hot water heating apparatus at his residence, 115 Bellevue Place, Chicago. Appellee by the terms of the contract was to furnish all labor and materials, after using all material of appellant then on the job, and complete the work "ready for plaster" by September 22, 1910; and was to be paid for the job ninety cents per hour for steam fitters and sixty cents per hour for helpers, and the net cost price of all other materials furnished, plus ten per cent, 85% of which contract price was to be paid as the work progressed.

Appellant urges on this appeal, (1) that the court erred in refusing to admit competent evidence to support his claim for set-off tending to show a damaged condition of the boiler originally installed on the premises and which was removed by appellant and returned to the party from whom it was purchased. The evidence so offered and rejected by the court was a letter from Richardson & Boynton, stating, in substance, that the boiler was received by them from appellee in a damaged and unsalable condition. It is one of the most elementary rules of evidence that hearsay evidence is not admissible in any law suit for any purpose, and particularly statements of third parties in their own interest, and who are

384 .A.1231

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THESE TWO DOCUMENTS ARE BEING FORWARDED TO YOU FOR YOUR INFORMATION.

National Steam Heating Company recovered a verdict
 of \$500.00 against William G. Moulton, and
 as balance due upon a written contract for the installation
 of a hot water heating apparatus at his residence, his resi-
 dence, Chicago. The contract was made by the terms of the contract
 as to furnish all labor and materials, after seeing all materials
 and equipment, then on the job, and complete the work "within the
 period" of September 27, 1910; and was to be paid for the
 work done by cash for work for steam fittings and other work
 and work for delivery, and the net cost price of all other
 materials furnished, plus the net cost, but of which amount
 there was to be paid as the work progressed.

[illegible]

in no way authorized to bind the party by such statements against whose interests the statements are made. The fact that appellant on cross examination of appellee testified that he had written to Richardson & Boynton to ascertain whether or not he could get credit for the boiler returned, had no bearing upon the question of the admissibility of the letter he received in reply to such inquiry. There was no evidence in the record tending to prove that appellee damaged the boiler, and there was no competent evidence tending to prove that it was in fact damaged. Therefore, there could be no recovery therefor in this case.

Certain instructions given by the court on behalf of appellee are complained of by appellant. The instructions state correct propositions of law. The first one complained of is an abstract proposition of law, and assumes as a fact that the delay of appellee was caused by appellant or those working for him not doing work which should necessarily be done before appellee could do his work. If it be conceded that there was no evidence upon which to base the instruction, appellant was in no way prejudiced thereby. Appellee proved his right of recovery clearly and beyond question. Appellant's evidence did not prove or tend to prove any defense thereto whatever by way of set-off or recoupment or otherwise. His only proof amounted to a showing that he had the premises rented at \$100 per month and had paid rent thereon since the early part of August, 1910, and that the job let to appellee by the contract in question was not completed "ready for plaster", until about October 1st to 15th thereafter. The evidence does not show that appellant was caused to pay any rent by reason of such delay, or that such delay necessarily lost him the use of the premises for any length of time whatever. Besides, appellant waived any right to complain of delay, or to complain that appellee did not complete the contract. The

in no way authorized to bind the jury by such statements
against whose interests the statements are made. The fact
that appellant on cross examination of witnesses testified that
he had written to Richardson & Beggan to ascertain whether or
not he could get credit for the stolen property, and his
testimony upon the question of the inadmissibility of the letter
is decisive in reply to such inquiry. There was no evidence
in this regard tending to prove that appellant demanded the letter,
and there was no competent evidence tending to prove that it
was in fact demanded. Therefore, there could be no recovery
thereof in this case.

THE STATE'S EXHIBITION given by the State in this
case is comprised of the following. The letterhead
of the State's Exhibit of law. The letter and captioned
to be an abstract proposition of law, and answer to a fact
that the delay of appellant was caused by appellant or some
other person for him not being with which would necessarily be some
other person could be the work. It is the contention that
there was no evidence upon which to base the contention,
appellant was in no way prejudiced thereby. Appellant proved
his right of recovery clearly and beyond question. Appellant's
evidence did not prove or tend to prove any defense thereto
except by way of negation of argument or statement. His
only proof amounted to a statement that he had the property
stolen at 1100 per month and had been arrested there and
early part of August, 1930, and that he had been
by the court in question was not completed "very far from
fact," and that appellant is in this statement. The fact
does not show that appellant was caused to pay any part
by reason of such delay, or that such delay necessarily lost
him the use of the business for any length of time whatever.
Indeed, appellant himself may state the complaint of delay, or
to complain that appellant did not complete the contract. The

undisputed evidence in the record is to the effect that appellee quit the job first in October, because appellant told him to do so, and that he quit it in November finally, because appellant had not and would not pay it the 85% of the price for the completed work as he had agreed, and that appellee could not get money enough on the job to carry it along; that the 85% amounted to \$500.38 in October, 1910, no part of which was paid until October 13th, when appellee paid \$400, and never thereafter paid any more, and finally refused absolutely to do so, and that weekly statements for the 85% of the finished work had been presented to appellant from the time the work started. Appellee's evidence also shows without contradiction that changes were made in the plans at the request of appellant, one of which was made October 1st by putting in a larger boiler, and that appellee was necessarily delayed by other trades working on the building. Appellant, therefore, recognized the contract as in full force in October, and made a payment thereon, and was then himself in default on payments. By refusing absolutely to pay money due on the contract appellant repudiated his contract, and that breach was never waived by appellee. Provisions of the contract requiring timely payments for work done, and requiring the work to be completed for plastering by a certain time, however, had been previously waived by both parties. Salt Fork Coal Co. v. Eldridge Coal Co., 170 Ill. App., 268.

The other instructions complained of by appellant are not subject to any of the criticisms urged by him. It is not deemed necessary to comment upon any further questions raised by either party to this record. There is no reversible error in this record and the judgment is affirmed.

AFFIRMED.

unlawful evidence in the record is to the effect that appellee
was the job fixed in October, because appellee said him to
do so, and that he was in November finally, because appel-
lee said he would not pay it the \$25 of the price for the
employment until he had agreed, and that appellee could not
let money come on the job to carry it along. That the \$25
amounted to \$100.00 in October, 1912, as part of which was
paid appellee's share, and appellee paid \$100, and that
appellee paid any more, and finally returned absolutely to
do so, and that weekly statements for the \$25 of the finished
work had been presented to appellee from the time the work
started. Appellee's statement and other things were
that these changes were made in the hands of the request of
appellee, and of which was made October 1st by paying in a
larger price, and that appellee was necessarily helped by
other things coming on the building. Appellee, therefore,
performed the contract as in full force in October, and made
a payment thereon, and was then released in default on payment.
By refusing absolutely to pay money due on the contract ap-
pellee repudiated his contract, and that breach was never
waived by appellee. Provisions of the contract requiring
weekly payments for work done, and requiring the work to be
completed and classified by a certain time, however, had been
strictly complied with by appellee. That fact alone
establishes fact that the contract was
The other facts are explained or explained
and not subject to any of the conditions upon by law. It
is not deemed necessary to comment upon any further questions
relating to this party in this record. There is no doubt
the error in this record and the judgment is affirmed.

469 - 18009.

THE UNIVERSITY CLUB OF CHICAGO,
a corporation,

Appellee,

vs.

EARL H. DEAKIN,

Appellant.)

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

182 I.A. 484

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Earl H. Deakin appeals from a judgment for \$2,007.66 in favor of The University Club of Chicago in a suit in assumpsit for a balance of rent due and interest under a lease of the south east corner store of appellee's club building, 140 Michigan avenue, for a "jewelry and art shop" for the term of one year from May 1, 1909. The lease was executed by appellee to appellant March 31, 1909, and provided for a rental of \$5,000 for the term payable in monthly installments of \$416.67. The twelfth clause of the lease provides as follows:

"Lessor hereby agrees during the term of this lease not to rent any other store in said University Club Building to any tenant Making a specialty of the sale of Japanese or Chinese goods or pearls."

On April 5, 1909, appellee executed a lease to W. K. Sandberg of another store in its said building, 138 Michigan avenue, for a "watch maker and jewelry establishment and for no other purpose", and for the same term as that named in the lease to appellant, and for a rental of \$2,500 for the term. The twelfth provision in Sandberg's lease specifically provided as follows:

"It is further distinctly understood and agreed by and between the parties hereto that at no time during the term of this lease will the lessee herein use the leased premises

100 - 10000

THE UNIVERSITY OF CHICAGO
MUNICIPAL COURT
OF CHICAGO

1821A.484

MR. JUSTICE BUNGAN DELIVERED THE OPINION OF THE COURT.

Paul H. Bogan appeals from a judgment for \$3,000.00 in favor of The University Club of Chicago in a suit in assumpsit for a balance of rent due and interest under a lease of the south east corner store of appellee's club building, 125 Michigan Avenue, for a "bakery and eat shop" for the year from May 1, 1928. The lease was executed in duplicate in duplicate form in 1927 and contains the terms of \$3,000 for the term payable in monthly installments of \$250.00. The twelfth clause of the lease provides as follows:

"The lessee shall maintain the premises in a clean and sanitary condition and shall keep the same free from all rubbish and refuse."

On April 5, 1928, appellee executed a lease to W. K. Bogan for another year for the same premises, the lease providing for a "bakery and eat shop" and for the same term as that made in no other respect, and for the same term as that made in no other respect, and for a rental of \$2,500 for the year. The twelfth provision in Bogan's lease is identical with that in the lease executed by appellee.

"It is further stipulated that no time shall be lost in the execution of the lease and that the lessee shall keep the premises in a clean and sanitary condition and shall keep the same free from all rubbish and refuse."

for a collateral loan or pawn shop, or make a specialty therein of the sale of pearls."

Appellant defended the suit before the lower court without a jury upon the ground that he was released from liability by reason of appellee having leased the other store in the building to Sandberg who made a specialty of the sale of pearls, and also filed a counter claim for damages for the said alleged violation of appellee's covenant.

The evidence discloses that on April 25, 1909, appellant wrote to C. G. Holden, manager of appellee, in substance, that he was informed that a jewelry store was to be started in appellee's building two doors from him and that he had been led to believe that the other party was to deal exclusively in watches, and asked that this matter be placed before appellee's board to ascertain what could be done in the matter of cancelling one or the other of the two leases. Mr. Holden replied, in substance, that he was informed by Mr. Fischer, who for appellee leased appellant the property in question, that appellant knew very well Sandberg was "to handle watches, etc." and that Fisher had incorporated in Sandberg's lease that he "could not deal in pearls in any way, which was agreeable to you". About the first part of June, after appellant had entered into his store in question, he saw pearls displayed in Sandberg's window at 138 Michigan avenue, and on the 10th of June saw an advertisement of Sandberg's in the Chicago Tribune that featured pearls. About June 15th appellant had a telephone conversation with Mr. Bond, treasurer of appellee, saying, in substance, that he was sick and wanted to go away, and asked if appellee would accept another tenant, a milliner, in his place. Mr. Bond took the matter up with appellee and wrote appellant June 18th that the "committee regret that you feel it necessary to make any change,***** They are willing to accept another tenant whose line of

and a certified copy of the same, to make a permanent record of the same.

The following statement is made by the said party in the above-mentioned letter, and is also filed as a counter claim for damages for the same, and also filed as a counter claim for damages for the same, and also filed as a counter claim for damages for the same.

The following statement is made by the said party in the above-mentioned letter, and is also filed as a counter claim for damages for the same, and also filed as a counter claim for damages for the same, and also filed as a counter claim for damages for the same.

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The following statement is made by the said party in the above-mentioned letter, and is also filed as a counter claim for damages for the same, and also filed as a counter claim for damages for the same, and also filed as a counter claim for damages for the same.

The following statement is made by the said party in the above-mentioned letter, and is also filed as a counter claim for damages for the same, and also filed as a counter claim for damages for the same, and also filed as a counter claim for damages for the same.

They are willing to accept another tenant under the same

business is satisfactory to them. That of milliner would not be satisfactory, as they feel it would not be a proper occupancy for one of the club stores, especially the corner."

Mr. John S. Goodwin, appellant's attorney, about June 24th, began negotiations with appellee to have the lease canceled, informing it that the lease was made void by the leasing to Sandberg who was selling pearls, and failing in this on June 30, 1909, delivered by letter the keys to the store at 140 Michigan avenue, and notified the officials of appellee that appellant had terminated the lease because of said violation thereof by appellee. November 15, 1909, appellant went into the store in question under a new lease with a written agreement that the lease and his occupancy was to be without prejudice to either party to existing rights in question in this suit, and finished out his term named in the former lease, paying the same rental. The judgment is for the four and one-half months that the store was left vacant, and for which time the rent was not paid.

It is insisted by appellant that the 12th clause of the lease sued on went to the whole of the consideration and was a condition precedent to the right of the lessor to recover rent, that is, that the covenant to pay rent and said 12th clause are dependent covenants; that the inserting of the clause in Sandberg's lease forbidding him from making a specialty of the sale of pearls was not the only duty imposed upon appellee by the 12th clause of appellant's lease, but it was also appellee's duty to enforce the prohibitory clause in Sandberg's lease and to prevent him from making a specialty of such sales. He also insists that the remedy of appellant for a breach of the said 12th clause of the lease by a suit for damages was not exclusive, but that appellant had the right, if he so elected, upon a breach of said clause, to surrender

up possession of the premises within a reasonable time after discovery of the breach without any liability to appellee for rent. The court refused to hold as the law his said propositions, and held for appellee as a matter of law that the 18th clause was an independent covenant for the violation of which appellant merely had his right of action for damages. The court also held that all the obligations imposed upon appellee by that covenant were performed by it by incorporating in Sandberg's lease a provision that he should not make a specialty of the sale of pearls in his premises. It is apparent from a reading of the twelfth clause of appellant's lease that the covenant therein expressed is not a dependent covenant, that is, a covenant the performance of which appellee was required to prove before it could maintain its suit against appellee for rent. It is clearly an independent covenant which goes only to a part of the consideration, and for a breach thereof appellant in this suit only had a right to set-off or to recoup any damages the evidence might show he sustained thereby. The covenant was not expressly made a condition precedent to a right of recovery for rent. It did not go to the whole of the consideration. It is not even mentioned in the lease as a part of the expressed consideration to appellant for his covenants the first of which is to pay the rent named. It simply appears as a mere stipulation on the part of appellee, for the breach of which appellant would have the undoubted right of recouping his damages. Such a covenant, however, cannot be made by appellant a weapon of defense to any extent without showing a breach thereof by appellee and consequent damages to himself. "In the construction of a particular provision the intention of the grantor governs, and where there is any doubt whether the intention of the grantor is to create a covenant or a condition, the courts are inclined to construe it as a covenant, and not as a

[illegible]

condition." Rubens v. Hill, 213 Ill., 523; Davis v. Wiley, 4 Ill., 323; The Chicago Legal News Co. v. Brown, 103 Ill., 317.

There was no eviction of appellant, actual or constructive. "The rule is well settled that the wrongful act of the landlord does not debar him from a recovery of rent, unless the tenant by such act has been deprived in whole or in part of the possession, either actually or constructively, or the premises rendered useless." Rubens v. Hill, *supra*, Op. 543; Barrett v. Boddie, 158 Ill., 479. A lessee's obligation to pay rent does not depend upon his having actual possession. Hau v. Baker, 118 Ill. App., 150; Schulian v. Hoerth, 151 Ill. App., 532.

The covenant in question in the lease to appellant was not broken by appellee. By that covenant it simply agreed that during the term of appellant's lease it would not rent any store in appellee's building to any tenant making a specialty of the sale of Japanese and Chinese goods or pearls, and the words, "making a specialty", were underlined in the lease. The only violation claimed by appellant is the fact that Sandberg's firm sold pearls after moving into the store at 138 Michigan avenue. There is no evidence in the record that Sandberg or his firm ever made a specialty of the sale of pearls, before he leased the store of appellee, or that appellee knew that he or his firm intended doing so, or that appellee consented to his doing so, while occupying his store as a tenant of appellee. Appellee in fact had him to covenant specially that he would not at any time during the term of his lease make a specialty of the sale of pearls, and the lease further specified that it was leased for a "watch maker and jewelry establishment and for no other purpose". Appellee did not covenant that it would not permit any tenant to make

a specialty of the sale of pearls after the tenant entered under any lease covering appellant's term, or that it would eject any tenant so offending or cancel his lease, and, therefore, it is of no consequence, as we view the matter, that Sandberg & Co. did sell pearls or make a specialty thereof at 138 Michigan avenue during appellant's term at 140 Michigan avenue. Covenants restraining the power of alienation, or in restraint of trade, will be construed strictly, and to the end that the restraint shall not be extended beyond the express stipulation; and all doubts must, as a general rule, be resolved against the restriction. The decided tendency of modern decisions by both chancery and law courts is not to imply covenants which might and ought to have been expressed, if intended. Postal T. C. Co. v. The Western U. T. Co., 155 Ill., 335; Lucente v. Davis, 101 Md., 506; Kemp v. Bird, 5 Chen. Div., (1877) 976 (Eng.); Sheete v. Selden, 7 Wall., 416; Livingston v. Stickles, 7 Hill, 253; Apelin v. Austin, 52 B., 671; Field v. Mills, 33 N. J. L., 254.

Edgar Leon, general manager of W. K. Sandberg, doing business as W. K. Sandberg & Co., testified that before Mr. Sandberg moved into the premises at 138 Michigan avenue he had a watch maker's stand repairing watches and such in the Columbus Memorial Building on the fourteenth floor, and that up to that time Mr. Sandberg had no experience as a general jeweler to his knowledge; that witness was with Sandberg from May, 1909, until May, 1910, and that his stock consisted of jewelry of all kinds, and also gems, different sorts of stones, such as sapphires, emeralds, pearls and rubies, and such like; that most of the pearls and some of the jewelry was on consignment, and that the pearls were oriental, fresh water and seed pearls, and that at the start they had about \$10,000 worth of pearls, consisting of a few pearl necklaces

and some loose pearls, and that they sold about \$1,500 worth of pearls during the time he was there, including a pearl necklace at \$1,000. Mr. Sandberg testified that he began occupying that store leased to him by appellee between May 1st and May 22, 1909, and that in the year and a half he had been there since that time he had sold \$2,000 in pearls alone, that is, pearl necklaces and loose pearls, and that his total sales for the year was about \$12,000; that he had in his stock about \$2,000 worth of pearls at wholesale price, and from \$12,000 to \$14,000 of other jewelry, ten per cent of which had pearl sets in it. The testimony that Mr. Sandberg had never engaged in the sale of pearls prior to May 1, 1909, is uncontradicted. There is no evidence in the record as to Mr. Sandberg's profits on the pearls he sold, or as to what appellant's profits would have been on the same sales, or as to how much, if any, he was damaged by the sale of pearls by Sandberg. There is, therefore, no evidence whatever upon which to base any recovery by appellant upon his counter claim for damages, even supposing that appellee had broken its said covenant.

We do not deem it important to discuss the other errors assigned by appellant, as a consideration thereof is not material to the decision of the case. Appellant is bound by the terms of the lease, and parol testimony could not be received to modify or change the plain, unambiguous meaning thereof. While the holdings of the court on propositions of law may be said to be not strictly accurate in every instance, they are substantially correct in so far as they pertain to the merits of this case. The court did not err in entering the judgment in favor of appellee, and it is affirmed.

AFFIRMED.

495 - 13035.

MARY ROYLS, administratrix of the
estate of James J. Royle, deceased,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

182 I.A. 486

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Chicago City Railway Company appeals from a judgment in favor of Mary Royle, administratrix, for \$5,000, as damages to the widow and next of kin for the death of James J. Royle.

The single count declaration charges that appellant is the owner of a street railway in Chicago, known as the Cottage Grove Avenue line, and that on June 14, 1909, appellant brought one of its cars to a stop at the intersection of Cottage Grove avenue and 63rd street in order that appellee's intestate might board it; that while the said James Royle was a passenger upon the steps of said car in the act of mounting the same, and in the exercise of due care for his own safety, appellant negligently, carelessly, wantonly and willfully started the said car with a violent jerk, and in a sudden and rapid manner propelled the car forward and at a high and dangerous rate of speed and negligently and carelessly failed to give the said James Royle a sufficient time in which to safely board said car; and that in consequence of said misconduct, the said James Royle was then and there thrown with great force and violence off said car and upon the ground and so severely injured that he thereafter, June 18, 1909, died, leaving surviving him his widow, Mary Royle, and eight children.

Appellant first attacks the judgment upon the ground that it is not supported by the evidence. It is conceded by both parties to the judgment that appellant has two tracks in Cottage Grove avenue lying north and south; that its cars going north run over the easterly track and those going south over the westerly one, and that it also has a double track line crossing Cottage Grove avenue at 63rd street, and that there is in 63rd street at that crossing the elevated structure of the South Side Elevated Railway Company and one of its stations; that at the time in question there was on the north east corner of said crossing a Greek fruit store, on the south east corner, a drug store, on the north west corner, Snell's saloon, and on the south west corner, Kavanaugh's saloon. There were only three witnesses that saw the accident, and they all testified for appellee. Mayy Christian testified that she was a trained nurse, and that on June 14, 1909, at 11:40 or 11:45 P. M., she stopped on the north east corner of said crossing to wait for a west bound car to take her home, and saw a north bound car stopped on the south side of 63rd street; that it crossed and stopped with its rear end ten or fifteen feet north of the north line of 63rd street and about three women got on the car; that then another woman came hastily from behind the car and the conductor held it, and Mr. Royle stepped back and stood there with one foot on the step with his right hand on the perpendicular rod that separates the back of the car from the conductor's place; that the woman stepped on the car before Mr. Royle had a chance to get a second footing, and that the conductor then gave the signal to start and the car lurched and threw Mr. Royle back and he fell striking his head on the rail back of the car, and that that sickened her and she ran over to the drug store; that nobody was on the platform except the woman, the conductor and Mr. Royle when he was

Appellant first attacked the judgment upon the ground

that it is not supported by the evidence. It is contended

by both parties to the judgment that appellant has two trunks

in Chicago Grove avenue lying north and south; that the case

being north run over the easterly trunk and there being south

west the westerly one, and that it also has a double trunk

the westerly trunk runs across at 53rd street, and that

it is in fact a trunk which is that crossing the elevated street

and in the fact that elevated railway Company and one of

its officers, that at the time in question there was on

the north east corner of said crossing a Greek fruit store,

on the south west corner, a fruit store, on the north west

corner, Kelly's saloon, and on the south west corner, have-

man's saloon. There were only three witnesses that saw

the accident, and they all testified for appellant. Mary

Quinn testified that she was a witness, and that

on June 14, 1909, at 11:40 or 11:45 P. M., she stopped on

the north east corner of said crossing to wait for a street

car to take her home, and saw a north bound car stopped on

the south side of 53rd street; that it crossed and stopped

with its rear end ten or fifteen feet north of her north line

of 53rd street and about three women got on the car; that

then another woman came hastily from behind the car and the

conductor said "it" and "it" Royie stepped back and stood there

with one foot on the step with his right hand on the hand-

rail and that thereafter the back of the car from the

conductor's place; that the woman stepped on the car before

Mr. Royie had a chance to get a second footing, and that the

conductor then gave the signal to start and the car moved on

and threw Mr. Royie back and he fell striking his head on

the rail back of the car, and that that happened but not the

car over to the east side; that nobody was on the platform

except the woman, the conductor and Mr. Royie when he was

injured; that they brought him to the drug store and he looked to be knocked unconscious, and there was a large gash on the top of his head; that she did not detect the odor of liquor, but she endeavored to give him some whiskey as a stimulant and spilled some of it there, and was endeavoring to stanch the flow of blood with antiseptic cotton and to bandage his head when Dr. Elliott came and took the case off her hands; that the very instant the car started Royle fell to the ground and lay where he fell and that she thought he fell a little north of the elevated steps there.

Mr. Chester, a traveling salesman and a Civil War veteran, testified that he had been visiting his sick comrade, Mr. Kimler, and that about 11:45 P. M. he, with Kimler, was at that drug store to take the north bound car on 63rd street; that he saw Mr. Royle, whom he did not then know, coming across the street to take the car, and that he stepped up on the step and the car started and he fell and struck on his head some way; that he did not notice particularly whether or not he was intoxicated, but thought he was all right, and that he did not stagger any; that the accident happened right in front of the drug store on Cottage Grove Avenue as it comes north and that he did not remember exactly, but it happened practically in front of the drug store, between it and Kavanagh's saloon on the south west corner there.

Mr. Kimler was too sick to go to court and testified by deposition that he and Mr. Chester were standing on the north east corner there and the car coming from the south stopped about - "they generally aim to stop about 50 feet north of 63rd street"; that Royle was trying to get on the car like a good many others, and when the car started up Royle's feet were on the foot-board and his hands holding the center guard, and he was thrown backwards on the pavement and his head "burst open"; that he, after Royle had fallen, saw

interior; that they brought him to the front where he
 looked to be in a position of command, and there was a large
 number of men; that he did not enter the car
 at first, but was ordered to give him some whiskey as a
 drink and spilled some of it there, and was endeavoring
 to get the flow of blood with antiseptic cotton and to
 change his head when Dr. Elliott came and took the case off
 his hands; that the very instant the car started he fell
 to the ground and lay there in full view and that the
 car started with him in the street.

Mr. Chester, a traveling salesman and a Civil War
 veteran, testified that he had been visiting his sick mother,
 Mr. Chester, and that about 11:45 P. M. he, with Walter,
 as that was the name of the boy, went out on the street;
 that he saw Mr. Kelly, whom he did not then know, coming
 across the street to take the car, and that he stayed up
 to the stop and the car started and he fell and struck on
 his head some way; that he did not notice particularly whether
 or not he was intoxicated, but thought he was all right, and
 that he did not stagger any; that the accident happened right
 in front of the drug store on College Street as it comes
 south and that he did not remember exactly, but it happened
 practically in front of the drug store, between it and Hav-
 erhill's saloon on the south west corner there.

Mr. Walter was also asked to go to court and testified
 by deposition that he and Mr. Chester were standing on the
 north west corner there and the car coming from the north
 stopped about - "they generally in the road about 10 feet
 north of 32nd street"; that Kelly was trying to get on the
 car like a good many others, and that the car started up Kelly's
 feet were on the foot-board and his hands holding the wheel
 guard, and he was thrown backward on the pavement and his
 head "burst open"; that he, Walter Kelly and Walter, the

blood and Royle was unconscious and went away in an ambulance; that he and Chester were in and out of the drug store two or three times and were on the south east corner when the accident happened and that that was where the accident happened; that there was great excitement there after the accident, and several policemen were there and that one of them took his name as a witness.

Mary Royle testified that she was the widow of the deceased and that she last saw her husband that night at 10 o'clock, and that he had supper with his family at 6 o'clock; that he went out that night to get ten cents worth of whiskey, and she next saw him at the hospital; that he was a healthy, able-bodied man forty-eight years of age, rarely ever sick, a painter by trade, was generally employed at his trade, and earned from fifty to fifty-seven dollars per week, and gave his money to her for the support of his family and education of his eight children; that he had periodical spree and would then be under the influence of liquor several days or weeks, and would then remain sober for a long time, sometimes for one, two or three years.

For appellant, the conductor, Otto Haes, testified that the car was a pay-as-you-enter car and that it stopped on the south side of 63rd street and two passengers got on there; that no passenger got on the car north of the street crossing, and nobody was standing there at the usual place to get on the car, and that he saw no one there waiting to get on the car and nobody was on the back platform at any time after he crossed 63rd street; that he first saw Royle lying straight across the track, his head east about fifty feet behind his car after it was about one hundred and twenty-five feet north of the north east corner. He admitted that he might have testified to the coroner that when he was about

60 feet north of that north east corner he looked back through the rear window and saw a man lying directly across the track and that he did not remember whether or not the car stopped on that corner that night.

The motorman, James A. Parker, corroborates the conductor by testifying that he could see from one building line to the other when he crossed that crossing, and he saw no man or woman on the north side of 63rd street at the usual stopping place, and that he did not stop on the north side, and that when about 105 feet north of 63rd street, he stopped his car on a signal from the conductor and saw a man across the tracks 75 feet north of 63rd street, lying head east; that the north side of the street was the regular stopping place for his car, and that he probably did testify to the coroner that he did not remember whether or not he stopped that night on the north side of 63rd street, and that he did not then know whether or not he did so.

Harry Devinney: I was a passenger on the front end of the car when it was crossing that crossing, and had a good view of the street; The car did not stop on the north side, and nobody was on the north side there when it crossed, and the emergency bell rang when the car was about 150 feet north of the street.

Charles Carlson: I was on the east side of Cottage Grove avenue seventy-five feet north of 63rd street and saw Royle lying on the track just across the north cross walk with his head east and about opposite me and about ten feet north of the elevated stairs. I testified before the coroner that Royle lay about fifty feet north of 63rd street.

John Voight, who knew Royle well, testified that he saw him about ten minutes before the accident north of 63rd street on the north west corner leaning against a post of the elevated road.

GO Lay north of East North West corner in building back through
the rear window and saw a man lying directly across the street
and went to his car, remembering nothing as he was stopped
by the man who lay dead.

The witness, James A. Barker, described the
man, stating by testifying that he could see from his position
view to the other when he crossed that crossing, and he saw
a man on the south side of East street at the corner
standing alone, and that he did not stop on the north side,
and that when about 100 feet north of Third street, he noticed
his car on a signal from the conductor and saw a man across
the street to East North of Third street, lying dead.
That the north side of the street was the remaining stopping
place for his car, and that he stopped his car in the
vicinity that he did not remember whether he was in front
of his car on the north side of East street, and that he did
not know whether or not he did so.

Harry Hoverson: I was a passenger on the front end
of the car when it was approaching that crossing, and had a good
view of the street. The car did not stop on the north side,
and nobody was on the north side when it crossed, and
the emergency bell rang when the car was about 100 feet north
of the street.

Charles Gairson: I was on the west side of College
street across Avenue-Like East North of East street and saw
a man lying on the street just across the street with his
head east and about opposite to the street for East North
of the street. I testified before the coroner that
I saw about 100 feet north of East street.

John Wilson, who lives with, testified that he
saw this about five minutes before the accident north of East
street on the north west corner looking against a post of the
street light.

F. C. Landon, who had a pop corn cart at the north west corner, also testified for appellant that Royle passed on the north side of his cart and crossed over to the north east corner of that crossing about five minutes before the accident.

Police officers, O'Sullivan and Buttermar, who assisted in removing Royle to the drug store, testified that his body was found across the track with his head on the east rail about 60 to 75 feet north of 63rd street on Cottage Grove avenue. About four officers, including O'Sullivan and Buttermar, testified that Royle was intoxicated at the time of his injury, and that a half pint bottle was found in his coat pocket with about two inches of whiskey in it, and that Miss Christian stated to them after the accident that she did not see it, or that she failed to answer that she did see it when the officers were inquiring for persons who saw the accident. A number of other persons testify that Royle was intoxicated that afternoon and night, and that he was in the habit of becoming intoxicated. Other witnesses testified that Royle was usually sober and worked at his trade and earned good wages.

The evidence of Miss Christian and of Mrs. Royle, if true, is ample proof to support the judgment under the charge of negligence, and Miss Christian's evidence is, as above shown, abundantly corroborated in its main essentials. The precise spot upon which Royle was injured, or where he lay after he was injured, is not of vital importance in this case, and the fact that Miss Christian was contradicted by several of the witnesses as to just where the accident occurred does not afford much reason for discrediting her. It is morally certain from the evidence that Royle was injured not far from that north east corner, and the jury in our judgment were warranted in the belief from the evidence that she was

T. C. Jackson, who had a pop gun back at the north
west corner, also testified for appellant that Boyle passed
by the north side of his yard and crossed over to the south
west corner at that of seeing about five minutes before the
shooting.

These witnesses, C. Sullivan and Edgewood, who
testified in removing Boyle to the back street, testified that
his body was found across the road with his head on the
west side about 40 to 75 feet north of 21st street on Cottage
Street. About four witnesses, including C. Sullivan and
Edgewood, testified that Boyle was intoxicated at the time
of the injury, and that a half pint bottle was found in his
coat pocket with about two inches of whiskey in it, and that
Edgewood stated to him after the shooting that he did
not see it, or that he failed to answer that one did not
and the witness was inquiring for answers who was the
shooter. A number of other persons testify that Boyle was
intoxicated that afternoon and night, and that it was in the
west of becoming intoxicated. Other witnesses testified
that Boyle was usually sober and worked at his trade and
driven good wages.

The evidence of Miss Christian and of Mrs. Boyle
is that it might prove to support the judgment under the
charge of negligence, and Miss Christian's evidence is, as
shown above, substantially corroborated in the main essentials.
The witness spot upon which Boyle was injured, as shown by
his effect he was injured, is not of vital importance in this
case, and the fact that Miss Christian was a witness in the

general of the witnesses as to fact where the accident occurred
does not afford much reason for disbelieving her. It is
generally certain from the evidence that Boyle was injured and
for that that north west corner, and the fact in our judgment
was presented in the belief from the witnesses that one was

more nearly accurate as to the precise spot where he was injured than any other witness. She denied stating that night that she did not see the accident, and there is abundant evidence in the record that she was there when the accident occurred, and was busy attending the deceased when the inquiries were made for parties who saw the accident. Her credibility was certainly a question for the jury, and it was also a question for the jury to determine whether or not the defendant was guilty, as charged. That the verdict is not manifestly against the weight of the evidence is clear, and it needs no argument to support that conclusion after the foregoing evidence is considered. The evidence as to the intoxication of the deceased is the strongest feature of the case in favor of appellant in our judgment. Still, the verdict of the jury to the effect that the deceased was in the exercise of reasonable care for his safety, and that he was not injured by his own contributory negligence, or because of his intoxication, is also amply supported by the evidence. The position of appellant that there is no evidence to support the averment that Royle died of the injuries he sustained there is so untenable as to not require serious consideration. Besides the evidence already quoted the testimony of Dr. Chauvet was that he examined the wound on Royle's head, and also found him unconscious when he reached the hospital that night, and that he remained so until he died, with his pulse quite weak and slow and his respiration quite shallow. He also stated that it was his opinion that he was suffering from shock, due to injury, and that he died by reason of his injuries received. Notwithstanding the fact that Dr. Springer testified that he found at the autopsy the heart of the deceased enlarged, very fatty, soft and flabby, his liver very fatty, and that his stomach showed chronic gastritis, or alcoholism, and further testified before the coroner that

[illegible]

Royle died "from traumatism associated with alcoholism", and before the court that he died "from alcoholism associated with traumatism", and that his death was all caused by alcoholism, the jury, nevertheless, were fully warranted from all the evidence in finding that the injuries Royle received were the proximate cause of his death, and that he was a reasonably healthy man earning good wages.

It is urged that the court erred in permitting Dr. Chauvet and Dr. Adams to answer certain hypothetical questions asked them, in substance, that it was their opinion that Royle's death resulted from the injuries in question received on the back of his head. It is argued that these hypothetical questions were unnecessary and improper, because Dr. Chauvet had personal knowledge of the nature and extent of Royle's injuries to enable him to testify from his own knowledge, and because the doctors were thus permitted to determine the controverted question as to what caused the death, thereby usurping the province of the jury. Although the question as to whether or not Royle died from the injuries so received was for the jury to determine, yet, it was a proper question upon which to receive the expert evidence of physicians for the consideration of the jury. The jury were not bound by it necessarily and it did not invade their province. It is unquestioned that he received the injuries. It is not usual to permit physicians to state what caused an injury, or as to how it was caused, when that question is a controverted one, but as to the effect of an injury upon the person receiving it, physicians may legally testify and in answer to hypothetical questions. We know of no reason or authority for any physician's personal knowledge of the extent of the injuries disqualifying him from doing so. The People v. Harenow, 238 Ill., 514; Fuhry v. The Chic. C. Ry.

Co., 239 Ill., 542; City of Chicago v. Didier, 207 Ill., 571; I. C. R. R. Co. v. Smith, 208 Ill., 608.

It was discretionary with the court to admit the expert evidence in rebuttal, although affirmative evidence in establishment of appellee's case. Appellant has waived any right to claim that the hypothetical questions contained improper elements or lacked other elements that should have been included, by not making those specific objections. Riverton Coal Co. v. Shepherd, 207 Ill., 305; C. & E. I. R. R. Co. v. Wallace, 208 Ill., 129. The other objections that improper evidence in rebuttal was admitted are untenable and relate to matters in evidence of little or no weight in settling any question in the case.

It was not reversible error for the court to refuse to instruct the jury that there was no evidence justifying a verdict based upon the charge of willful or wanton misconduct on the part of appellant. The instructions given the jury were all based upon the charge of negligence simply, and the jury were repeatedly informed by the instructions that contributory negligence of the deceased would bar appellee's recovery. The count was double, charging negligence and willful or wanton misconduct, and was subject to successful attack by special demurrer, but appellant did not choose to so attack it. It is too late now after judgment to complain of duplicity in the declaration. Where there is one good count or charge in the declaration supported by the evidence upon which the jury evidently based their verdict, an erroneous denial of a motion to take from the jury other counts or charges not supported by the evidence is not ground for a reversal of the judgment. Scott v. Parlin & Grandorff Co., 245 Ill., 420. The evidence amply supports the charge of negligence in the declaration, and there is no variance, and the judgment

20. City of Chicago v. Taylor, 107 Ill. 401.

1. E. R. N. Co. v. Smith, 107 Ill. 408.

It was distinguished with the cases to which the
court referred in regard to, although alternative evidence
in establishment of appellee's case. Appellate court
was held to claim that the hypothetical question as to
whether elements or facts of one element that which have
been included, by not asking those specific questions.

2. E. R. N. Co. v. Smith, 107 Ill. 408.

3. E. R. N. Co. v. Smith, 107 Ill. 408. The court
held that evidence in respect was admitted and admissible
and that to require evidence of facts in no way in
material any question in the case.

It was not reversible error for the court to refuse
to instruct the jury that there was no evidence of
negligence upon the charge of negligence as the jury
on the part of appellant. The instructions given the jury

were all based upon the charge of negligence, and
the jury were repeatedly informed by the instructions that
anybody negligence of the deceased would bar appellant's
recovery. The court was correct in holding that

admitted as proper evidence, and was correct in holding
evidence by special committee, and appellant did not choose to
re-argue it. It is too late now after judgment to complain

of anything in the instruction. There is no
doubt or change in the instruction supported by the evidence
upon which the jury evidently found their verdict, an erroneous
denial of a motion to set aside the jury's verdict on charges
not supported by the evidence is not ground for a reversal.

4. E. R. N. Co. v. Smith, 107 Ill. 408.

The court was correct in holding that
in the instruction, and there is no evidence, and the judgment

- 10 -

is not excessive.

Finding no reversible errors in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

INFORMANT IS RELEASED

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GUST PERETES,
Defendant in Error, }
vs. }
JOHN TOMPARY and PETER TOMPARY,
Plaintiffs in Error. }

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

On October 3, 1911, Gust Peretes had judgment by confession entered against John and Peter Tompary, plaintiffs in error, for \$77.93, including nine dollars attorney's fee. October 27, 1911, plaintiffs in error filed a motion to open up the judgment and for leave to defend the suit supported by affidavit, in substance, that they were indebted to defendant in error only in the sum of \$13.34; that on December 17, 1909, by mistake they gave him two notes for \$65.00 each in payment of an account of \$89.60; that afterwards they told him of the mistake and he agreed to and stated a balance due him of \$89.60, and said he would hold their notes until said balance was paid, and would return one of them to them when half said balance was paid; that on March 13, 1910, and afterwards, they made payments to him aggregating \$59.76 and received from him one of said notes; that they have also a set-off against said balance for \$16.00 for services rendered to him by James Tompary, a partner of plaintiffs in error, leaving a balance of \$13.34 due defendant in error, and that said note is a partnership note.

No brief or argument has been filed by defendant in error. The debt due from a copartnership of two or three members sued jointly can not be off-set by a debt due from plaintiff to one of such firm. A separate demand can not

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THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION

On October 1, 1900, the Journal of the American Medical Association was published by the American Medical Association, 535 North Dearborn Street, Chicago, Ill. The Journal is published weekly, except on Sundays and public holidays. The subscription price for 1900 is \$5.00 in advance, payable by check or money order. Single copies are sold at 10 cents. The Journal is sent free of charge to members of the American Medical Association. The Journal is also sent to libraries and to other institutions upon request. The Journal is published by the American Medical Association, 535 North Dearborn Street, Chicago, Ill. The Journal is published weekly, except on Sundays and public holidays. The subscription price for 1900 is \$5.00 in advance, payable by check or money order. Single copies are sold at 10 cents. The Journal is sent free of charge to members of the American Medical Association. The Journal is also sent to libraries and to other institutions upon request.

be set off against a joint demand for want of mutuality.

Burgin v. Babcock, 11 Ill., 38; Lenox v. Stevenson, 36 Ill., 49.

The affidavit, however, disclosed a good defense as to the other claim of set-off by plaintiffs in error, and, therefore, the court erred in denying their motion. Moses v. Schendorf, 143 Ill. App., 293, 238 Ill., 232.

The judgment is reversed and remanded with directions to open up the judgment and to permit plaintiffs in error to defend the suit.

REVERSED AND REMANDED
WITH DIRECTIONS.

Journal of Interpersonal Violence 25(12)

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THE UNIVERSITY OF CHICAGO
PRESS

March Term 1912

398 - 18443.

| | | |
|------------------|---|----------------|
| EMMA M. BELL, |) | APPEAL FROM |
| Appellee, |) | |
| vs. |) | SUPERIOR COURT |
| KOSSUTH H. BELL, |) | COOK COUNTY. |
| Appellant. |) | |

182 I.A. 496

MR. PRESIDING JUSTICE MESURELY
DELIVERED THE OPINION OF THE COURT.

Emma M. Bell, hereinafter called complainant, filed her bill for divorce and asked for alimony. On October 31, 1911, upon her motion for temporary alimony, the chancellor entered an order that the defendant pay to her \$250 per month for her support and maintenance until the further order of the court, the first payment to be made on October 30, 1911.

By this appeal to this court it is sought to have this order vacated and set aside. It is argued that there can be no order allowing alimony where the bill does not state a cause of action, and it is urged that the complainant does not by her bill specifically charge the defendant with having committed adultery.

Without reciting the allegations of the bill, which it must be conceded is inartificially drawn, it is sufficient to say that in our opinion the bill does contain charges sufficient to justify the court in granting temporary alimony. While we do not discuss the propriety at that time of the amount allowed by the order of October 31, 1911, we do wish to be understood as not intending by this opinion to affect in any way any order of the chancellor entered subsequent to October 31, 1911, touching the matter of alimony.

After this cause was taken under advisement the appellant, Kossuth H. Bell, departed this life, on July 12, 1913, and his

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James M. Hall, respondent, called respondent, filed her
bill for divorce and asked for alimony. On October 11, 1911,
your honor motion for temporary alimony, the chancellor ordered
an order that the defendant pay to her \$200 per month for her
support and maintenance until the further order of the court,
the first payment to be made on October 30, 1911.
By this appeal to this court it is sought to have this
order vacated and set aside. It is argued that there can be no
vacation of an alimony order where the bill does not state a cause of
action, and it is urged that the complaint does not by her
bill specifically charge the defendant with having committed
adultery.

Without resisting the allegations of the bill, which it
must be conceded are substantially true, it is sufficient to
say that in our opinion the bill does contain charges sufficient
to justify the court in granting temporary alimony. While it is
not known the property at that time of the amount allowed by
the order of October 11, 1911, we do wish to be understood as not
intending by this opinion to affect in any way any order of the
chancellor entered subsequent to October 11, 1911, granting the
order of alimony.
After this case was taken under advisement the respondent,
Kearney M. Hall, reported this case, on July 12, 1912, and his

death has been suggested. Accordingly the judgment of the Superior Court will be affirmed, nunc pro tunc as of July 11, 1913.

Leonard v. Springer, 174 Ill. App. 516.

AFFIRMED.

March Term 1913

311 - 19322

PAULINE MATSON,
Appellee,

vs.

CLARE S. JACOBS et al on ap-
peal of ALVIN E. WERBER,
Appellant.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

182 I.A. 497

MR. PRESIDING JUSTICE F. A. SMITH
DELIVERED THE OPINION OF THE COURT.

A motion is made to dismiss the appeal in this case for the reason that no complete record and no abstracts and briefs have been filed by the appellant within the time required by the rules and practice of this court. The record filed on March 3, 1913, is a short record. The time for filing a complete record with abstracts and briefs for appellant has been extended from time to time until and including August 31, 1915. No further extension has been made. No valid excuse is shown for the failure to file a complete record and abstracts and briefs within the time specified by the orders of this court. For non-compliance with the orders and rules of this court, the motion to dismiss the appeal is sustained and the appeal is dismissed.

APPEAL DISMISSED.

FILE - INDEX

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1914

APPEAR FROM CURTIS

COURT, MOORE COURT

1821.A.487

CLARK W. JAMESON
JAMES W. JAMESON
JAMES W. JAMESON

MR. JAMESON
JAMES W. JAMESON
JAMES W. JAMESON

A motion is made to dismiss the appeal in this case
and the reason that no complete record and no abstract and briefs
have been filed by the appellant within the time required by the
rules and practice of this court. The record filed on March 1,
1914, is a short record. The time for filing a complete record
with abstracts and briefs for appellant has been extended from time
to time until and including August 31, 1914. No further extension
has been made. No valid excuse is shown for the failure to file a
complete record and abstract and briefs within the time specified
by the orders of this court. For non-compliance with the orders
and rules of this court, the motion to dismiss the appeal is now
granted and the appeal is dismissed.

WILLIAM JAMESON

October Term 1913

462-19865

ALBERT L. SCHULTZ and ALBERT
F. SCHULTZ, co-partners as
A. L. SCHULTZ & SONS,
Appellees.

vs.

WENIG TRADING COMPANY, a cor-
poration,
Appellant.

APPEAL FROM COUNTY

COURT, COOK COUNTY.

182 I.A. 498

MR. PRESIDING JUSTICE F. A. SMITH
DELIVERED THE OPINION OF THE COURT.

A motion is made by appellee to strike from the record of this cause the affidavit of Nicholas Fritsker. The record contains no bill of exceptions whereby the affidavit could be made a part of the record. The motion to strike the affidavit must be sustained.

It is further moved to dismiss the appeal or affirm the judgment. The appeal must be dismissed for the reason that the errors assigned are predicated upon the affidavit of Fritsker. As to the judgment by default, it must be presumed that the default was entered before the plea was filed. The record, which is our only means of ascertaining the fact, shows that the default was entered previous to the filing of the plea. The appeal is dismissed.

APPEAL DISMISSED.

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1821.A.498

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J. J. ROBERTS AND SONS

MR. JUSTICE: JUSTICE P. A. SMITH
DELIVERED THE DECISION OF THE COURT.

A motion is made by special to strike from the record
of this case the affidavit of Nicholas P. Smith. The record con-
tains no bill of exceptions whereby the affidavit could be made a
part of the record. The motion is denied. The affidavit must be
renewed.
It is further moved to dismiss the appeal on affirm-
ance. The appeal must be dismissed for the reason that
the writs assigned are predicated upon the affidavit of P. Smith.
As the judgment by default is not to be renewed and the re-
cord was entered before the plea was filed. The record, which is
now only means of establishing the fact, shows that the defendant was
entered previous to the filing of the plea. The appeal is dis-
missed.

APPEAL DISMISSED.

5497

164

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

182 I.A. 518

*See 168 Ill App 333
no leave to enter also, & briefs*

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

2512

107

IN THE COURT OF THE UNITED STATES

At a session of the Court held at the City of New York, on the 10th day of April, 1918, the following case was argued and decided:

THE UNITED STATES OF AMERICA, Plaintiff, vs. JAMES H. HANCOCK, Defendant.

JOHN J. HANCOCK, Counsel for Plaintiff.

DAVID L. HANCOCK, Counsel for Defendant.

WILLIAM F. HANCOCK, Counsel for Defendant.

182 A. 518

J. G. MICHONNE, Reporter.

IT REMEMBERED, that after reading the opinion of the Court, the Court was divided in the following manner: 11 to 10, the opinion of the Court was filed in the office of said Court, in the books and papers of said Court, to-wit:

Gen. No. 5497.

Belle Kinkaid, appellee

vs

Appeal from Warren.

William M. Kinkaid, appellant.

Whitney, P. J.

This case was before this court once before when we reversed the decree for the reasons stated in our opinion reported in the 168 Ill. App. 333. The case then went to the supreme court where this court was reversed by opinion reported in the 356 Ill. 548, with directions to this court either to affirm or reverse and remand the cause for the reasons stated in the opinion of the supreme court.

We have re-examined the case and think for the reasons stated in our former opinion the case should be tried again.

Reversed and remanded.

Dec. 20, 1917.

Wm. H. H. H. H.

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Wm. H. H. H. H.

Wm. H. H. H. H.

This case was before this court once before when we reversed the decision for the reasons stated in our opinion

reported in the 100 Ill. App. 333. The case then went to the supreme court where this court was reversed by opinion reported in the 100 Ill. App. 333, with directions to this court to affirm or reverse and remand the cause for the reasons stated in the opinion of the supreme court.

We have re-examined the case and think for the reasons stated in our former opinion the case should be

reversed and remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

The following is a true and correct copy of the original
 of the said *Appellate Court*, as ordered this second day
 of August, in the year of our Lord one thousand nine hun-
 dred and thirteen.
 J. T. WATSON, Clerk of the said *Appellate Court*.
 I, the undersigned, being duly sworn, depose and say that the
 foregoing is a true and correct copy of the original of the
 said *Appellate Court*, as ordered this second day
 of August, in the year of our Lord one thousand nine hun-
 dred and thirteen.
 J. T. WATSON, Clerk of the said *Appellate Court*.

5670

165

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

1821A. 519

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

1150

IN A TERM OF THE APPELLATE COURT,

and that the same was done on Tuesday, the twenty day of April, in

the year of our Lord one thousand nine hundred and nineteen.

Witness my hand and the seal of said Court, at the City of New York,

THIS TWENTY DAY OF APRIL, A. D. 1919.

CHIEF JUSTICE

CLERK OF THE COURT

DEPUTY CLERK

DEPUTY CLERK

1891.11.10

IT IS REMEMBERED, that afterwards, to-wit: on the 22 day
of May, A. D. 1918, the opinion of the Court was filed in
the office of said Court, in the Court and Registry

Gen. No. 5870.

Frank Kohl, Admr. of the estate of
Henry Kohl, deceased.

vs

Appeal from Peoria.

Chester D. Clarkson,

Whitney, P. J.

Appellee's intestate was killed while cleaning a wringer in the laundry of appellant. Suit was brought to recover damages for the benefit of the next of kin.

The first count charged that deceased was a minor, eighteen years of age; that the operation of the wringer was new to him; that he had no knowledge of the dangers in the operation of the machine, and on account of his youth, did not appreciate the danger, and that appellant neglected to give ~~the~~ him the necessary instructions in regard to the operation, use, cleaning and care of the machine and did not explain to him how to safely perform the duties relating thereto, and that he remained ignorant thereof; and that three weeks after he began his employment, while in the exercise of due care and caution for his own safety he was drawn into the machine, when it was revolving at a high rate of speed, and received injuries from which he died. There were other counts which the Court took from the jury at the close of all the evidence, and which are not shown in this record, but no cross errors are assigned on that ruling, and those counts are not before us in any way. The trial resulted in a verdict for the Administrator, and judgment thereon of Two Thousand Dollars, from which an appeal is taken to this Court. Numerous errors are assigned, but as this hearing is decided on questions of fact, there will be in this opinion but a brief touching upon the

rulings of the Court below on questions of evidence and the giving and refusing of instructions. There were no eye witnesses who saw and could testify to the whole of the accident. When there is no eye witness to the killing of a person, his administrator may establish the exercise of ordinary care on the part of the deceased by the highest proof of which the case is capable, including the habits of deceased, and from any other facts and circumstances from which the jury may rightfully find that he was exercising such care. (Stellery v Cicero Street Ry. Co., 243 Ill. 290, and cases there cited.) Therefore, no error occurred in receiving evidence as to the habits of the deceased in this case. The appellant was put on the stand as a witness in his own behalf, and was asked in reference to deceased, if he had seen him prior to the accident on various occasions, and if he ever talked with him, or warned him with reference to the use of the machine in question, or placing his hands on the machine, which questions were objected to, and the objection sustained on the ground of the incompetency of the witness. We think that ruling of the court was proper. Nothing appeared in the case to remove the grounds of incompetency that both sides ~~would~~ concede existed unless such grounds were removed by the evidence in the case. Complaint is made of the giving of the first, second and third instructions asked by appellee. We think, under the evidence there was no error committed by the trial court in giving these instructions. The refusal of appellant's second, third, fifth and seventh instructions is also argued to have been erroneous. It is sufficient to say that the second and third of these instructions are but abstract propositions of Law, not tied to the evidence in this case, and there was no error in their refusal. The fifth and seventh

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THE UNIVERSITY OF CHICAGO

Journal of Management Education 34(1)

22

Wissenschaftliche Grundlagen

1. 7. 1881

Agoston's intimate was killed while cleaning a

As observed in Table 1, evidence is mixed on the negative

... damages for the benefit of the next of kin.

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operation of the machine, and on account of his

the following table have, together with statements from the

Requested to give him the necessary instructions in

...to the operation, use, cleaning and care of the machine

REPRODUCED FROM THE NATIONAL ARCHIVES AT COLLEGE PARK, MARYLAND

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and that three weeks after he began his employment, while

It is also noted that the above information was obtained from a confidential source who has provided reliable information in the past.

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There were other counts which the Court took from the jury

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...and those counts are not before us in any way. The

trial resulted in a verdict for the Administrator, and the

ment thereof of Two Thousand Dollars, from which an amount

is taken to this Court. Numerous errors are mentioned.

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... of the Court below on questions of evidence and the
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... who saw and could testify to the whole of the
... When there is no eye witness to the killing of a
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... in which the case is capable, including the habits of deceased,
... and that the Court may also consider the habits of the
... but not necessarily that the Court may consider the habits of the
... (Thompson v. State, 100 Ill. 200, 201) and may
... (Thompson v. State, 100 Ill. 200, 201) and may
... Therefore, no error occurred in receiving
... as to the habits of the deceased in this case.
... was put on and stand as a witness in his own
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... as the machine, which questions were objected to, and the
... objection sustained on the ground of the incompetency
... of the witness, to which the Court is not bound to pay
... being reported in the case to remove the grounds of inco-
... grounds were removed by the evidence in the case, and the
... is one of the giving of the first, second and third in-
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... there was no error committed by the trial court in giving
... These instructions, the refusal of which is not shown to be
... fifth and seventh instructions is also argued to have been
... extraneous. It is sufficient to say that the second and
... of law, not tied to the evidence in this case, and that
... was no error in their refusal. The fifth and seventh

instructions directed a verdict, and did not include all of the elements involved in the case. There was no error in their refusal.

The evidence in the case substantially shows the following:- A metal circular receptacle with small perforations enclosed within another circular receptacle was called the wringer. The wet clothes were packed in the inner receptacle when not in motion, and then a cloth was placed over the top, and the power was applied, which caused the inner receptacle to revolve at from nine hundred to twelve hundred times a minute, and the centrifugal force thereof drove the wet water out of the clothes. Once each week it was necessary to clean the wringer, which was done by the man who operated it, with Sapolio, or some kind of soap, and a cloth or rag, by scrubbing the inside of the inner receptacle, which revolved inside of the larger receptacle, which was stationary. The application of the power was right close to where the operator stood. The sister of deceased worked in the laundry, and she applied to the foreman to employ her brother, who was eighteen years of age, and he agreed to do so. On Monday morning, September 5th, 1910, deceased came to the laundry, and was introduced by his sister to the foreman, Hamlin who turned him over to a man Remy, to show him how to do the work; and Remy testified he did not instruct him how to clean the machine, or give him any instructions other than how to operate it, and it is the lack of such instruction which is set up in the count of the declaration mentioned. It was the custom to clean the wringer every Monday, but on September 5th, when deceased went to work, was Labor Day, it was not intended to run the laundry all day that day, therefore, the cleaning

[illegible]

was postponed until Tuesday. The foreman, Hamlin, testified that on Tuesday morning he spent from one half to three quarters of an hour to show deceased how to do the work, including the method of cleaning the wringer, and gave him instructions that he must never clean it when in motion, or put his hand in the basket when in motion; and that he waited and saw deceased clean the wringer, and that he did so without having it in motion. Brassfield, the engineer of appellant, testified that the second day deceased worked, he showed him how to shut off and turn on the power, and told him not to put his hand near the machine when it was running, and that if he did, it might take his hand off and told him he had known of a case where this had happened; and that he stood by and saw him operate the machine, and saw that he obeyed instructions. He also testified that fifteen minutes before the accident he saw deceased cleaning the wringer while in motion, and that he went to him to shut off the power, and told him never to do that or he would lose his arm or his life, and that if his arm or rag got caught, he would be drawn into the machine. One witness testified that twice during the three weeks deceased worked there, he saw him with his hand upon or near the machine when in motion, and that both times he went to him and told him to stop it. No one saw deceased at the instant of the accident, but sometime before he was seen by several persons, and he was pouring water into the wringer, and had it in motion. One other operator on a wringer testified that although the instructions were positive and direct never to clean the wringer when in motion, yet he had been in the habit, after he had scoured it, and before turning in the water to rinse it, to set it in motion so that the water would

...the water would
habit, after he had secured it, and before turning in the
clean the trigger when in motion, yet he had been in the
although the instructions were positive and direct never to
is in motion. One other operator on a trigger testified that
moment, and he was pouring water into the trigger, and had
to a accident, but notwithstanding he was seen by several
and told him to stop it. No one new descended at the instant
chine when in motion, and that both times he went to him
was) at there, he saw him with his hand upon or near the wa-
stress testified that while using the lever valve between
at the got caught, he would be thrown into the machine. One
he would lose his arm or his life, and that if his arm
him to shut off the power, and told him never to do that
cleaning the trigger while in motion, and that he went to
litter minutes - before the accident he was descending

...also testified that
not that he stood by and saw him operate the machine, and
and told him he had known of a man whose name had been
...and that if he did, it might injure him, and all
void this way so that his hand came too close to the
...and showed him that he was not to do that, and
...testified that the second guy descended worked,
...without having it in motion. Meanwhile, the engineer
...and now descended clean the trigger, and that he did
...that he must never clean it when in motion,
...the method of cleaning the trigger, and gave him
...of an hour to show descended how to do the work,
...last on Tuesday morning he spent from one half to three

be thrown out by the motion. When seen, just before the accident, deceased had it in motion, and had poured in water and had put his hand inside. The next moment a scream was heard, and he was seen with his arm and head drawn into the machine. The machine was stopped as quickly as possible and he was taken out unconscious, and never recovered consciousness, and died that day. There were contradictions in the testimony of the several witnesses, and it is argued this contradiction justified the jury in disbelieving the foreman and engineer, and in believing he was never instructed. Although the jury were the judges of the credibility of the witnesses, yet we are of opinion that there was so clear a preponderance of the testimony that he was repeatedly instructed and warned that the jury could not reasonably find otherwise. It was clearly established that deceased was specially and repeatedly warned against putting his hand inside the wringer while it was in motion, and against putting his hand inside the inner receptacle when cleaning it, while in motion, and that he violated these instructions, and that his doing so was the cause of his death, and that he was not in the exercise of due care for his own safety. It is argued that this meant, if true, that he was engaged in an attempt to commit suicide. We do not so view it. He might have been careless and negligent and disregarded instructions, and voluntarily did that which he had been told would take off his arm and kill him, without having any thought of suicide. It is evident he knew the danger. It is shown by a witness who testified, that as he went by the machine one day while deceased was running it, deceased told him, in a joking way, to put his hand in there and see how quick his arm would be taken off. It is not

... by the motion. When seen, just before the
accident, deceased had it in motion, and had poured in water
and had put his hand inside. The next moment a tremendous
explosion, and he was seen with his arms and head thrown into
the air. The machine was stopped as suddenly as possible
and he was taken out unconscious, and never recovered.
There were contradictions
in the testimony of the several witnesses, and it is argued
this contradiction justified the jury in disbelieving the
testimony of the engineer, and in believing he was never instructed.
It was the duty of the jury to weigh the credibility of the
witnesses, yet we are of opinion that there was no clear
preponderance of the testimony that he was repeatedly in-
structed and warned that the jury could not reasonably find
otherwise. It was clearly established that deceased was
instructed and repeatedly warned before starting the
machine the witness while it was in motion, and against
putting his hand inside the inner receptacle when clearing
it, while in motion, and that he violated these instructions,
and that his doing so was the cause of his death, and that he
was not in the exercise of the care for his own safety. It
is argued that this meant, at times, that he was engaged in
an attempt to secure evidence. We do not so view it. He
knew that his hand was in the inner receptacle and he was
instructed, and voluntarily did that which he had been
told would take off his arm and kill him, without having
any thought of evidence. It is argued that he was in a
It is shown by a witness who testified, that as he went
by the machine one day while deceased was running it,
and saw how quick his arm would be taken off. It is not

argued that a boy eighteen years of age could not be held to the rule of the exercise of ordinary care, or contributory negligence, and therefore it is unnecessary to review the authorities cited by appellee on that subject. The judgment is therefore reversed.

Reversed with finding of fact

(FINDING OF FACT TO BE INCORPORATED IN THE JUDGMENT):

We find that deceased was not in the exercise of due care for his own safety at the time when he received the injuries from which he died, and that he was guilty of negligence which resulted in his death.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

5674

166

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

182 I.A. 520

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

100

U. S. DEPT. OF JUSTICE

IN RE: [illegible]
[illegible]
[illegible]

[illegible]

[illegible]

[illegible]

WILLIAM C. DUFFY, JR.

MICHIGAN, 1917.

100-100000

RE: REMEMBERED, that afterwards, so-will: on the 14 day
of [illegible], D. D. 1918, the opinion of the Court was filed in
the office of said Court, in the words and figures

Gen. No. 5674.

Henrietta Bertha Hunse, Administrator
of the estate of Henry A. Hunse, deceased.
appellee

vs

Appeal from DuPage.

Chicago Great Western Railway Co.
appellant.

Whitney, P. J.

This appeal involves a judgment for \$3142.00 rendered in favor of appellee in an action on the case against appellant to recover damages for the benefit of the next of kin of Henry A. Hunse, deceased, for a death loss, alleged to have been caused by appellant's negligence.

The negligence charged in the several counts of the Declaration is negligent and careless operation of an engine and train; failure to give warnings at a certain highway crossing by bell or whistle as required by Statute; negligence in the construction of approaches to a crossing on a highway; running a train at a high rate of speed, and in failing to maintain the right of way at a highway crossing so that there should be a clear and unobstructed view along the railroad tracks.

The death was caused at a highway crossing in DuPage County between Gretten and Lombard. The highway known as Meyer's road, crosses the railroad at the place in question. The road runs north and south, and the railroad east and west. A highway known as St Charles Road runs about one hundred fifty feet North, and parallel with the railroad crossing Meyer's road. In the angle formed by Meyer's road and the St. Charles Road, West of Meyer's road and between the railroad and the St. Charles Road stands a dwelling house

This appeal involves a judgment for \$2148.00 rendered
 in favor of appellee in an action on the case against
 appellant to recover damages for the benefit of the next
 of kin of Harry A. Humes, deceased, for a death loss, al-
 leged to have been caused by appellant's negligence.
 The negligence charged in the several counts of the
 petition is negligent and careless operation of an
 engine and train; failure to give warnings at a certain
 highway crossing by bell or whistle as required by statute;
 negligence in the construction of approaches to a crossing
 on a highway; running train at a high rate of speed, and in
 failing to maintain the right of way at a highway crossing
 so that there should be a clear and unobstructed view along
 the railroad track.

The death was caused at a highway crossing in Dubuque
 County between Grafton and Lowland. The highway known as
 Meyer's road, crosses the railroad at the place in question.
 The road runs north and south, and the railroad east and
 west. A highway known as St. Charles Road runs about one
 hundred fifty feet north, and parallel with the railroad
 crossing Meyer's road. In the middle formed by Meyer's road
 and the St. Charles Road, west of Meyer's road and between
 the railroad and the St. Charles Road stands a dwelling house

occupied at the time of the accident by one Mrs. Trebiatrowski. St. Charles Road is three or four feet above the railroad tracks, with Meyer's Road descending toward the railroad. West from the crossing of the railroad and Meyer's Road, the railroad tracks run straight for about three quarters of a mile upgrade, with a twelve or fourteen foot rise, to a railroad viaduct. At the time of the accident, and for several days prior thereto, appellant had been engaged in raising its tracks East and West of and at the highway crossing. It is important to keep this in mind when considering the evidence of the highway crossing and its approaches, at the time of the accident, because what their condition might have been the day or evening before the accident, or the day after the accident would not accurately indicate their condition at the time of the accident, which occurred about one o'clock P. M. June 23rd, 1910. Deceased had lived in the dwelling house above mentioned for from one to three years according to the testimony of different witnesses (leaving it some two years before the accident) and while he lived there passed over this crossing almost daily, and after he had ceased to live in that house, he frequently went over the crossing.

If anything can be determined from the evidence it is that he was well acquainted with the surroundings of the crossing. June 23rd, 1910 was a warm, bright sunny day, with no evidence of any high wind blowing. The deceased was, prior, and up to the time he was killed, in good health, and could see well and hear well. He was going South on Meyer's Road, driving a onehorse wagon approaching said crossing. The only eye witness to the accident was Mrs. Trebiatrowski, who lived in said dwelling house, and

[illegible]

saw deceased driving south by her house. She had just heard the rumble and whistle of a train approaching from the west, and as she saw deceased, she called to him in a loud voice, "Oh Huncie, you will never get across that track," when he was within forty or fifty feet of the tracks, but he kept on driving his horse on a walk, apparently not having heard Mrs. Trebiatowski, or if he did hear her, giving no indication of it. His horse kept on walking right onto the crossing, and when deceased got onto the track, he looked right at the engine, the very next second he was struck by it.

Here was a case of a man sixty four years of age, in good health, with ability to hear and see well, familiar with all the surroundings, approaching a place over which as a man of prudence, he knew a train was liable to pass. He drove onto the crossing without stopping, or apparently looking, at a time when others heard an approaching train. Mrs. Trebiatowski heard the rumble and whistle of the train when deceased was forty or fifty feet from the railway tracks, and another witness heard the rumble of it. No fog or cloud was in the sky. It was clear and sun-shiny. Upon a careful reading of the evidence we are satisfied that the testimony of Mrs. Trebiatowski is in the main reliable and that it should be as fairly and fully considered as the evidence of any witness who has been subjected to as severe and lengthy a cross examination as this witness was. We are impressed that she was endeavoring to tell the truth and that an impartial consideration of her whole evidence discloses that she did testify truthfully.

It is the duty of one approaching a railroad crossing

and he heard a whistle south by her house. She had just heard
the whistle and whistle of a train approaching from the west.
and as she saw deceased, she called to him in a loud voice,
"Mr. Jones, you will never get across that track," when he was
within forty or fifty feet of the track, but he kept on
walking. His house was a walk, apparently not very long
from the track, or it he did hear her, giving no indi-
cation of it. His house kept on walking right into the
track, and when deceased got onto the track, he looked
right at the engine, the very same second he was struck by

17.

There was a case of a man sixty four years of age, in
good health, with ability to hear and see well, familiar
with all the surroundings, approaching a place over which
as a son of witness, he knew a train was liable to pass.
He drove onto the crossing without stopping, or apparently
looking, at a time when others heard an approaching train.
Mr. Trebickowski heard the rumble and whistle of the
train when deceased was forty or fifty feet from the railway
crossing, and another witness heard the rumble of it. He
saw or heard it in the air. It was clear and unobscured.
There is a careful reading of the evidence we are satisfied
that the testimony of Mr. Trebickowski is in the main
reliable and that it should be as fairly and fully con-
sidered as the evidence of any witness who has been subjected
to a cross-examination as this witness.
and it is our opinion that the testimony is all the
more and that an impartial consideration of her words alone
discloses that she did testify truthfully.
It is the duty of one approaching a railroad crossing

upon a highway, to look and listen for approaching trains, if a reasonable prudent person so situated would look and listen; and a failure to look and listen precludes a recovery for personal injury where, to have looked and listened, would have prevented the injury, and where there were no circumstances or conditions justifying a failure to look and listen or any obstruction to the view. (C. R. I. & PR Ry. Co. v Jones, 135 Ill. App. 380, and cases therein cited.) It seems almost impossible that the deceased could not have heard this approaching train, even if he did not see it.

The evidence is conflicting on the question of obstruction to the view at that point, so it is possible he could not have seen the train, but he is shown to have been so familiar with the spot, that he must have been thoroughly aware of the danger of not using his eyes, to the utmost extent of his ability. Deceased was killed as soon as the engine struck him. Deceased was thoroughly cognizant of all the conditions of that crossing, and he obviously did not look to see whether a train was coming, and he did not hear sounds of the approaching train, which were known to others who testified. He must have been either asleep or absorbed in his own reflections.

The positive evidence is that the engine whistled at the whistling post more than fifteen hundred feet west of this crossing, more than the statutory distance; that the fireman then got down to replenish the fire, and whether the automatic bell had been ringing prior to that time, he then pulled the cord, and started the bell, and it continued to ring until after the accident, and until the train ~~xx~~ stopped. There is negative evidence of persons who did not notice the whistling at the whistling post, or the ringing of the

...a highway, to look and listen for a...
...a responsible person so situated would look and...
...and a failure to look and listen precludes a recovery...
...the person injured...
...prevented the injury, and where there were no circum-
...or conditions...
...of the...
...135 Ill. App. 380, and cases therein cited.) It seems...
...almost impossible that the deceased could not have heard...
...this approaching train, even if he did not see it.

The evidence is conflicting on the question of...
...to the view at that point, as it is possible...
...did not have seen the train, but he is shown to have...
...so familiar with the spot, that he must have been...
...of the danger of not using his eyes, to...
...extent of his ability. Deceased was killed as soon...
...the engine struck him. Deceased was thoroughly cognizant...
...of all the conditions of that crossing, and he obviously...
...to see whether a train was coming, and he did not...
...of the approaching train, which were known to...
...who testified. He must have been either asleep or...
...in his own reflection.

The positive evidence is that the engine struck at the...
...not more than fifteen hundred feet west of this...
...were also the...
...to be...
...had been ringing prior to that time, he then pulled...
...and started the bell, and it continued to ring...
...and until the train was...
...is negative evidence of persons who did not notice...
...at the crossing west of the... of the

bell. There is a dispute in the testimony as to whether the engineer at the instant he saw the horse, just before he struck it, blew the whistle; the fireman being engaged in shoveling coal, did not see the wagon and horse at all. The wagon and horse being on the opposite side of the track from the engineer, he saw nothing until the horse came upon the track just ahead of him, and just before he struck the rig.

Considering all the evidence in the light of the decisions of the Courts, we regard the positive evidence as to the fact that the bell was rung and a whistle sounded, is entitled to more weight than negative evidence in relation to such facts. (C. R. I. & P. RY. Co. v Jones. 135 Ill. App. 380, and cases there cited.)

We are satisfied that the bell was ringing, and that the whistle was sounded. There is no satisfactory evidence in this record that appellant was negligent in any of the manners alleged. The track had been raised as above indicated, and they were working on it at that time, and its condition the day before the accident would throw but little weight light on its condition the day of the accident.

Before the accident on the twenty third day of June gravel had been placed between the rails, which had been leveled off to some extent, but the evidence is not that deceased was stalled between the tracks in fresh gravel. If that had been true, it might be urged as a ground of negligence, but his horse had merely got upon the track when the train struck it. There is no evidence that the train was running at an excessive rate of speed, nor is there any evidence of any improper management of the engine or train; but in any event appellee was not exercising due care and caution for his

There is a dispute in the testimony as to whether the witness at the instant he saw the horse, just before he struck it, saw the engine, the train being stopped in front of him, and not see the wagon and horse at all. The witness saw horses backing on the opposite side of the track from the engine, he was looking until the horses came up to the track just ahead of him, and just before he struck the

Considering all the evidence in the light of the testimony of the witness, he reached the positive evidence as to the fact that the bell was rung and a whistle sounded, he testified to more weight than negative evidence in relation to such facts. (C. R. I. & P. W. Co. v. Jones, 100 Ill. App. 380, and cases there cited.)

We are satisfied that the bell was ringing, and that the whistle was sounded. There is no explanation why the witness should not have testified to any of the facts which were within his knowledge at the time of the accident. The fact that he did not testify to such facts is not a ground for concluding that he was not working on it at that time, and the condition of the road before the accident would show but little weight should be given to the testimony of the witness.

Before the accident on the twenty third day of June 1901, had been placed between the rails, which had been leveled off to some extent, but the evidence is not that it was raised between the tracks in fresh gravel. If that had been true, it might be urged as a ground of negligence, but his horse had merely got upon the track when the train struck it. There is no evidence that the train was running at an excessive rate of speed, nor is there any evidence of any negligence of the engine or train; but in any event negligence was not excluding due care and caution for his

own safety, and his negligence must be held to have contributed to his death.

The judgment is therefore reversed.

(FINDING OF FACT TO BE INCORPORATED IN THE JUDGMENT)

We find that deceased was not in the exercise of due care for his own safety at the time he was killed, and that he lost his life because of his failure to exercise due care; and that defendant was not negligent as charged.

was asked, and his negligence must be held to have contrib-

uted to the death.

The judgment is therefore reversed.

(JUDGMENT ON PETITION FOR REINSTATEMENT IN THE JUDGMENT)

It is the duty of the court to see that the exercise of due
care for the safety of the time he was killed, and that
he lost his life because of his failure to exercise due
care; and the defendant was not negligent as charged.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

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5707

167

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

182 I.A. 521

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

AT THE COURT OF THE DISTRICT OF COLUMBIA

On the 14th day of May, 1914, the Court was called to order by the Honorable Chief Justice, who proceeded to read the following opinion of the Court:

THE COURT, by Chief Justice, said: This case was argued on the 14th day of May, 1914, and the Court has considered the same and is of the opinion that the judgment of the lower court should be affirmed.

It is so ordered.

WALTER S. WATSON, Chief Justice.

JOHN M. HANCOCK, Associate Justice.

1914-521

REMEMBERED, that afterwards, to-wit: on the 14th day of May, 1914, the opinion of the Court was filed in the office of said Court, in the words and figures following:

Gen. No. 3707.

Benjamin D. Herrick,

Deft. in error.

vs

Error to Iroquois.

Lissie Grove Ryan et al

Pliffs. in error.

Whitney, P. J.

This cause comes before this court on writ of error growing out of an order of distribution in a partition suit in which Benjamin D. Herrick was complainant and Lissie Grove Ryan and others were defendants, and on the denial of a motion to re-tax costs in the proceeding.

On April 4, 1901, defendant in error (who, for brevity, will hereafter be styled Herrick) filed in the court below his bill praying for partition of several tracts of land located in Woodford County, and one tract or lot of land located in Iroquois County. Demurrers were interposed to this bill by plaintiff in error and Helen H. Ryan and sustained. The demurrers having been sustained on August 1, 1910, Herrick, thereupon took leave to file an amended bill and filed the same on December 26, 1910, in and by which he described the lot in Iroquois county only. Plaintiff in error being in court, or represented therein by counsel, when leave was given to file the amended bill, cannot plead ignorance of the fact that it was filed, and she suffered the amended bill to go by default. A decree for partition pro confesso as to plaintiff in error was entered at the November Term 1910, and commissioners were appointed by the decree to make partition etc. They reported at said November term by which report they stated the premises were not susceptible of partition, and appraised the same. At the November Term 1910, on December 31, decree of sale was

CONF. NO. 1007

WILLIAM H. HARTLEY

PLAINTIFF

VS

ALBERT GROVE HARTLEY

DEFENDANT

CHICAGO, ILL.

Filed for Record

This cause comes before this court on writ of error
granted out of an order of distribution in a partition suit
in which WILLIAM H. HARTLEY was complainant and ALBERT GROVE
HARTLEY and others were defendants, and on the denial of a
motion to set aside the decree in the proceedings.
On April 4, 1910, defendant in error (now, the plaintiff,
ALBERT GROVE HARTLEY) filed in the court below
his bill praying for partition of several tracts of land
located in Woodford County, and one tract or lot of land
located in Tipton County. Defendants were interested in
this bill by plaintiff in error and Helen M. Ryan and one-
third. The defendants having been sustained on August 1,
1910, HARTLEY, thereupon took leave to file an amended bill
and filed the same on December 26, 1910, in and by which he
described the lot in Tipton County only. Plaintiff in
error being in court, or represented therein by counsel,
when leave was given to file the amended bill, cannot plead
ignorance of the fact that it was filed, and she withdrew
the amended bill to go by default. A decree for partition
was entered as to plaintiff in error and Helen M. Ryan and one-
third on November 19, 1910, and commissioners were appointed by the
court to make partition etc. They reported as said
November term by which report they stated the premises were
not susceptible of partition, and appraised the same. At
the November term 1910, on December 31, decree of sale was

entered and on February 4, 1911, the November Term adjourned. Report of sale was made at the March term 1911, and at said March term on April 17, the report of sale was approved by decree then entered and by the same decree the solicitor's fee and the guardian ad litem's fees herein complained of were fixed upon proof submitted in open court, and by the same decree the master was ordered to make distribution of the proceeds of sale, among other things being directed to pay "To Fred Benjamin, Clerk's costs, \$121.75" and on May 30, 1911, the March Term adjourned. The record shows that at the November term 1911 a report of partial distribution was filed and approved; the order of approval recited "and no objections being offered thereto" to which report is attached the receipt of the clerk of the circuit court showing that there was paid him \$121.75 "for fees accrued". The first effort was made by plaintiff in error to question the taxation of costs was on the 30th day of December 1911, one of the days of the November 1911 term, when she filed her motion in the court below to re-tax costs by written motion unsigned by her or her counsel. The motion to re-tax costs was set down for hearing on December 30, 1911. There is no certificate of the evidence heard on the motion to re-tax in the record, therefore, we are compelled to pass on the record as it is written. There is no item pointed out specifically that is claimed to be wrong in "clerk's costs, \$121.75" and in that item the fault must be, if anywhere. Every intendment is in the first instance in favor of the proper taxation of costs in the absence of proof to the contrary. In the order of distribution the master is directed "to pay Fred Benjamin, Clerk's costs, \$121.75". The report of distribution shows payment to Fred Benjamin, costs and fees of \$121.75. On such a show-

... on January 4, 1911, the November Term
... of sale was made at the March term 1911,
... on April 14, the report of sale
... by the same person
... the November Term 1911
... of were filed upon proof submitted in open
... and by the same person
... of the proceeds of sale, among other
... to pay Fred Benjamin, Clerk's
... 1911, the same time
... the November Term 1911 a report of
... was filed and approved; the order of
... was filed and approved; the order of
... the receipt of the clerk of the
... was filed and approved; the order of
... The first effect was made of
... in error to question the taxation of costs was on the 19th
... one of the days of the November 1911
... when she filed her motion in the court below to re-
... by motion assigned by her to the court
... The motion to set aside was set down for hearing on
... December 30, 1911. There is no certificate of the evidence
... on the motion to set aside in the record, therefore, we
... are compelled to base on the record as it is written. There
... as we then pointed out a motion to set aside is claimed to be
... wrong in "Clark's costs, \$101.75" and in what item the
... it is claimed that the motion is to set aside
... instance in favor of the proper taxation of costs in the
... absence of proof to the contrary. In the order of distribu-
... tion a motion is directed "to pay Fred Benjamin, Clerk's
... costs, \$101.75". The report of distribution shows payment
... to Fred Benjamin, costs and fees of \$101.75. On such a show-

ing and the court could do nothing but overrule the motion to retax costs. Plaintiff in error was in her argument certain things are wrong, but the record fails to disclose what items, if any, were improperly taxed by the clerk. We cannot indulge in inferences and presumptions with no record before us, except a direction to pay "to Fred Benjamin, clerk's costs \$131.75." Perhaps solicitor's fees guardian ad litem fees and sheriff's fees for service of parties residing in Woodford county were included in the \$131.75 but we would have to infer it, for it is certainly not set out in the record. There is no evidence in the record that the clerk taxed among the "clerk's costs" either a solicitor's fee, a guardian ad litem's fee, or any sheriff's fees. There was no praecipe for a record filed and the clerk certifies "the above and foregoing to be a true, perfect and complete transcript of the record in a certain cause lately pending in said court on the chancery side thereof."

The record shows no evidence of what, if anything, was wrong in the item the master was directed to pay, namely the item "to pay Fred Benjamin, clerk's costs, \$131.75."

A motion in the court below was the only basis for the retaxation of costs. (*Klaajda v Wiland* 93 Ill.App. 373.

Considering the state of the record we cannot see that the court below erred in denying the motion to retax costs.

Taxation by clerk is presumed to be correct. (*Ency. Law & Procedure*, Vol. 11, P. 165.)

Every intendment is in favor of the proper taxation of costs. (*Dietrich v Richey* 34 Ill. App. 343.)

There may or may not have been error in allowing a solicitor's fee and guardian ad litem's fee. We are not passing on that nor is it necessary to the disposition of

let the court come to nothing but overrule the motion
to dismiss. Plaintiff in error says in her argument
certain things are wrong, but the record fails to disclose
what items, if any, were improperly taxed by the clerk. We
cannot indulge in inferences and presumptions with no
basis before us, except a direction to say "it is
affirmed, clerk's fees \$11.75." Defendant's fees for services of
counsel and fifteen fees and sheriff's fees for services of
counsel pending in Woodford county were included in the
bill. It is not to be inferred that it is certainly
not all in the record. There is no evidence in the
record that the clerk taxed among the "clerk's costs".
Defendant's bill, in addition to items for
sheriff's fees. There was no passage for a record
bill, and for which defendant's bill was not returned.
We find, therefore, that the record is not
in a certain sense lately pending in said court on the claim
of the plaintiff. The record shows no evidence of what, if anything, was
taxed as the item the matter was taxed to pay, namely
the sum of \$11.75, but defendant's bill, \$11.75.
A motion in the court below was the only basis for the
restitution of costs. (Hickley v. Williams, 24 Ill. App. 373.)
Considering the state of the record we cannot see that
the court below erred in denying the motion to return costs.
Restitution by clerk is presumed to be correct. (Hickley, law
of Woodford, Ill., 2, 188.)
Every inference is in favor of the proper restitution
of costs. (Hickley v. Williams, 24 Ill. App. 348.)
There may or may not have been error in allowing
defendant's fees and counsel as defendant's fees. We are not
saying on that point that it is necessary to the disposition of

the case to do so.

By her motion to retax costs, plaintiff in error relitigated the question of the allowance of such fees and she has not preserved the evidence, if any, taken on the hearing of the motion to retax. And we must presume that sufficient proof was heard to justify the denial of the motion.

There is nothing in the record showing that such allowance in any way affected the amount directed to be paid plaintiff in error in distribution.

So far as it appears the error, if any, there was, worked no harm to her.

Nothing appearing in the record showing in what particulars the taxation of costs was wrong, we are disposed to affirm the order of the circuit court.

Judgment affirmed.

the case to do so.

by her motion to relax costs, plaintiff in error re-
sisted the question of the allowance of such fees and
the law has provided for witnesses, it says, that as the
testimony of the motion to relax. And we must presume that
plaintiff in error was heard to justify the denial of the

motion.
There is nothing in the record showing that such allow-
ance in any way affected the amount directed to be paid
plaintiff in error in distribution.

On the 12th of March, 1887, the court, by its order,
said we have to pay.
Nothing appearing in the record showing in that part-
icular the taxation of costs was wrong, we are
disposed to affirm the order of the circuit court.
Judgment affirmed.

The court then proceeded to discuss the merits of the case, and after a lengthy opinion, affirmed the judgment of the circuit court. The opinion was delivered by the chief justice, and the other justices concurred. The case was then remanded to the circuit court for further proceedings. The court then adjourned until the next term.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

168

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

182 I.A. 522

Op. mod. R. H. denied
Oct 9. 1913

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:



6745

IN RE THE ESTATE OF

and that the said ...
... of the said ...
... for the said ...
... of the said ...

RECEIVED

...

... on the 21 day ...
... D. 1915, the opinion of the Court was filed in ...
... in the word ...

Gen. No. 5753

Mrs. M. Sears, appellant.

vs

Appeal from Putnam.

C. C. Emerson & Company et al

appellees.

Whitney, P. J.

Mrs. M. Sears had a claim against the non-resident firm of C. C. Emerson & Company, and sued out a writ of attachment before a justice of the peace against that firm in which garnishee summons was served on A. W. Hopkins as having certain funds in his hands belonging to said C. C. Emerson & Company. The American National Bank filed an interpleader under the statute claiming the fund and on a trial judgment was rendered in effect finding the fund to be the property of the American National Bank and dismissing the suit at the costs of the plaintiff therein, from which this appeal is prosecuted.

The facts briefly stated are that Emerson & Company sold some potatoes to Zraik & Trahd, an Illinois firm, drew a sight draft on them for \$218.00, attached the draft to the bill of lading and endorsed and deposited said draft and bill of lading with the American National Bank. Said bank gave credit to C. C. Emerson & Company for the amount of the draft and forwarded same to A. W. Hopkins, an Illinois banker doing business at Granville, Illinois, in the name of the Granville Bank by Zraik & Trahd and on the same day Hopkins was served with summons as a garnishee of C. C. Emerson & Company. Various proceedings were had in the attachment suit and on the garnishment branch thereof prior to the filing of the interpleader by the American National Bank, in none of which, however, was final judgment rendered.

The M. G. Co. had a claim against the non-resident
 of G. O. Emerson & Company, and sued out a writ of ad-
 iudicium before a Justice of the Peace against that firm in
 which garnishee summons was served on A. W. Hopkins as having
 certain funds in his hands belonging to said G. O. Emerson
 & Company. The American National Bank filed an interpleader
 under the statute claiming the fund and an initial judgment
 was rendered in effect finding the fund to be the property
 of the American National Bank and dismissing the suit of the
 cause of the plaintiff therein, from which this appeal is
 brought.

The facts briefly stated are that Emerson & Company
 sold some potatoes to Frank & Trade, an Illinois firm, drew
 a draft on them for \$218.00, attached the draft to
 the bill of lading and endorsed and deposited said draft
 and bill of lading with the American National Bank, said
 bank gave credit to G. O. Emerson & Company for the amount
 of the draft and forwarded same to A. W. Hopkins, an Illi-
 nois banker doing business at Granville, Illinois, in the
 name of the Granville Bank by Frank & Trade and on the same
 day Hopkins was served with summons as a garnishee of G. O.
 Emerson & Company. Various proceedings were had in the su-
 preme court and on the garnishment process thereat prior
 to the filing of the interpleader by the American National
 Bank, in none of which, however, was final judgment rendered.

for the attaching creditor or against the garnishee, as their interpleader was filed in apt time and the motion of appellant to strike the interpleader from the files was properly over-ruled. *Julliard & Co. v May, assignee*, 130 Ill. 87.

Appellant also filed a demurrer to the interpleader which was overruled. The filing of the demurrer amounted to a waiver of the claim that the interpleader was interposed too late. *Julliard v May, supra*.

Appellant instead of standing by her demurrer to the interpleader went to a trial on the merits on the issues made thereby and introduced evidence on that trial. This amounted to a waiver of the claim that the court erred in overruling the demurrer. *Hepler v The People* 236 Ill. 275.

The case originated in justice court and going to trial on the merits and introducing evidence on the issues raised by the interpleader was in effect pleading the general issue to the interpleader. On the trial in behalf of the American National Bank the sight draft for \$218.90 endorsed by C. C. Emerson & Company and the bill of lading attached also endorsed by C.C. Emerson & Company were submitted in evidence without objection. A deposit slip made at the American National Bank and testified to by the assistant cashier of that bank as an original entry of deposit with said bank showing a deposit among other things of "check on Zraik & Trahd for \$218.90" was also offered in evidence by the bank and received in evidence ~~without objection~~. The assistant cashier testified without objection to the sight draft and bill of lading above mentioned and that they were deposited in his bank in the regular course of business and that a deposit slip of the transaction was made on the day it purports to have been made, October 12, 1920; that he had compared the deposit slip with the books of the bank

[illegible]

and that the deposit slip was true and correct. No evidence was offered by appellant which in any way had the slightest tendency to rebut the evidence offered by the bank so that as the case rested at the close of the trial the evidence of the bank was the only evidence on the subject of the ownership of the fund.

This case is to be controlled by the law announced in *First National Bank of Hiawatha, Kansas v. Walsh, Boyle & Co.* 131 Ill. App. 508. All of the evidence before us is to the effect that the American National Bank received this draft on deposit with other items of cash and other checks and drafts in the usual course of business. Even if the deposit slip had not been offered in evidence, which clearly shows a deposit and not a receipt for collection, the testimony of the cashier was that the draft was received as a deposit and in the absence of proof of fraud we would be bound to presume it was like any other item of deposit and that the bank upon the deposit being made, entered it as a credit item against which C. C. Emerson & Company had the right to check in the usual course of business. No evidence appeared showing the deposit was ever charged back against the depositor. There was no proof of anything but the proceeds of this draft ever coming into the hands of the garnishee. The trial judge had but one thing to do and that was to refuse the instruction offered by appellant to find against the claimant. It did not harm appellant whether the instruction to the jury to find for claimant was verbal or in writing.

Seeing no reversible error in the record on any of the errors assigned and argued, the judgment of the circuit court is affirmed.

and that the deposit slip was true and correct. No evidence was offered by appellant which in any way had the slightest tendency to rebut the evidence offered by the bank so that as the case rested at the close of the trial the evidence at the bank was the only evidence on the subject of the ownership of the fund.

This case is to be controlled by the law announced in First National Bank of New York v. Walsh, Boyle & Co. 125 Ill. App. 2d 108. All of the evidence before us is to the effect that the American National Bank received this draft in payment with other items of cash and other checks and drafts in the usual course of business. Even if the deposit slip had been offered in evidence, which clearly shows a defect in the receipt for collection, the testimony of the witness was that the draft was received as a deposit and in the absence of proof to the contrary we must assume it was.

There is no like any other item of deposit and that the bank when the deposit being made, entered it as a credit item against which C. C. Johnson & Company had the right to draw in the usual course of business. In witness whereof, stating the deposit was over charged back against the bank. There was no proof of anything but the proceeds of the draft ever coming into the hands of the payee. The bank had but one thing to do and that was to refuse payment. It did not have appellant's check and the institution for the day to find for appellant was verbal in writing. Being no reversible error in the record on any of the errors assigned and argued, the judgment of the circuit court is affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

1. *Adhuc quodammodo in statu est, utrum sit*
possibile, ut homo sit immortalis.
 2. *Adhuc quodammodo in statu est, utrum sit*
possibile, ut homo sit immortalis.
 3. *Adhuc quodammodo in statu est, utrum sit*
possibile, ut homo sit immortalis.
 4. *Adhuc quodammodo in statu est, utrum sit*
possibile, ut homo sit immortalis.
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possibile, ut homo sit immortalis.
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possibile, ut homo sit immortalis.
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possibile, ut homo sit immortalis.
 8. *Adhuc quodammodo in statu est, utrum sit*
possibile, ut homo sit immortalis.
 9. *Adhuc quodammodo in statu est, utrum sit*
possibile, ut homo sit immortalis.
 10. *Adhuc quodammodo in statu est, utrum sit*
possibile, ut homo sit immortalis.

5761

170

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

1821.A. 527

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 5761.

People &c. appellee.

vs x

Appeal from Co. St. Peoria.

Lucy Moore, alleged custodian of

Carl Moore, appellant.

Whitney, P. J.

A petition was filed in the court below pursuant to the statute to inquire into the alleged dependency of Carl Moore, a male child of about three years of age, alleged in the petition to be dependent and without proper parental care or guardianship, and Lucy Moore was named in the petition as having the custody of said child. The child was produced in court by her, a jury sworn and impaneled to try the questions at issue, and a verdict and judgment followed finding said child a dependent, and an order was entered committing him to the Illinois Home & Aid Society, subject to the control of the court, from which order and judgment the said Lucy Moore prosecutes this appeal.

It was urged in the court below and is here urged that the county court of Peoria county had no jurisdiction of the case, the cause alleged being that the child was not a resident of that county, but was a resident of Bureau county. The question of the home of the child is the only question in the case. As we regard the case it is controlled by a very few facts which seem to be undisputed in any way. The verdict of the jury and the judgment of the court is not set out in the abstract and for that reason alone we might affirm the judgment of the court below, but we prefer to put our decision on other grounds. The child was born in Peoria County, a bastard child, and the said Lucy Moore testified that the mother of the child gave him to her when

1977 2000 2000

Wages in apparel

Agency from Co. Dr. P. 1011

To neighbors here in good good

• *Journal of the American Medical Association*

7. 9. 1911

A petition was filed in the court below at New York on

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... a male child of about three years of age, alleged

TABLE 1. Summary of the results of the analysis of variance for the effect of the different factors on the response variables.

...of friendship, and Lucy Moore was named in the post-

and having the custody of said child. The child was

in court by her, a jury sworn and impaneled to try

How often the thought has taken me that, even in another life,

ing said child a dependent, and an order was entered

co- sitting him to the Illinois Home & Aid Society, subject

in the opinion of the court, from which order and judgment

the only lady Moore mentioned this morning.

It was tucked in the coat below and is here tucked

the county court of Peoria county had no jurisdiction

the case, the cause alleged being that the child was

and a resident of that county, but was a resident of Bureau

County. The question of the home of the child is the only

action in the case, as we regard the case it is controlled

you are disappointed or even doubt what we've said

way. The verdict of the jury and the judgment of the court

u. ten are in the interest and for the common good of the

affirm the judgment of the court below, but we prefer

but our decision on other grounds. The child was born in

Rocky Mountain, and the said lady Moore

testified that the mother of the child gave him to her when

the child was about eight or nine days old, and that the child had been under her care and control ever since. It appears from the testimony he lived a part of the time with her and part of the time with a son of hers, who kept a saloon at Spring Valley in Bureau County. Lucy Moore is shown by the testimony to be a colored woman and the keeper of a house of prostitution at No. 126 Eaton Street, Peoria, and lives next door at No. 127 Eaton Street. There is a yard between the two houses to which the inmates of the house have access and where this child was accustomed to play. It seems the child was bought within the jurisdiction of the county court of Peoria County when about one month old, and that Lucy Moore claimed to be its mother, but finally admitted that she was not, and that the court allowed Lucy Moore to have temporary custody of the child on condition she should not have him in her home. She then caused him to be kept at a house in Chicago with a certain Mrs. Franklin, and the court afterwards ascertained she was not a respectable person. Afterward, Mrs. Franklin notified the Peoria County probation officer that Lucy Moore had taken the child back to Peoria. The probation officer then discovered the white boy was kept part of the time at Lucy Moore's place and part of the time at her son's place in Spring Valley. The child having been given to Lucy Moore by its mother as Lucy Moore claims, and Lucy Moore testifying that she has the care and control of the child, and has had it ever since the child was given to her, thus she could have the child either in Chicago or Peoria or Spring Valley as she saw fit and when she saw fit, and the child having been a part of the time in Peoria, under such circumstances and under such control, we are of the opinion that the child is, within the meaning of the law, a resident of Peoria county and within

the child was about eight or nine days old, and that the child
had been with her since her birth. It appears
from the testimony he lived a part of the time with her and
part of the time with a son of hers, who kept a saloon at
Spring Valley in Brown County. Lucy Moore is shown by the
testimony to be a colored woman and the sister of a woman
of prostitution at No. 126 Union Street, Peoria, and lives
near that at No. 127 Union Street. There is a road between
the two houses so that the inmates of the house have access
and here this child was not allowed to play. It seems the
child was brought within the jurisdiction of the county court
of Peoria County when about one month old, and that Lucy
Moore claimed to be the mother, but frankly admitted that
she was not, and that the court allowed Lucy Moore to have
temporary custody of the child on condition she should not
leave him in her home. She then caused him to be kept at a
house in Chicago with a certain Mrs. Williams, and the court
attest is ascertained she was not a respectable person.
Attorney, Mr. Williams called the Peoria County Probate
court officer that Lucy Moore had taken the child back to
Peoria. The probate officer then discovered the white boy
and kept part of the time at Lucy Moore's place and part
of the time at her son's place in Spring Valley. The child
having been taken in Lucy Moore's arms as Lucy Moore
claimed, and Lucy Moore testifying that she has the care
and control of the child, and has had it ever since the
child was given to her, thus she would have the child either
in Chicago or Peoria or Spring Valley as she saw fit and
when she saw fit, and the child having been a part of
the time in Peoria, and the court officer and the court
control, we are of the opinion that the child is, within the
meaning of the law, a resident of Peoria county and within

the jurisdiction of the county court of that county, and that the child is a dependent, without proper parental care or guardianship, and that the judgment of the county court was proper.

Judgment affirmed.

relationship, and that the judgment of the county court was
erroneous as it is dependent, without proper precedent case or
jurisdiction of the county court of that county, and that

• Some of the for ...

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

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Whitney, P.J.

177

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

1821 A. 528

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5703.

Hess V. Hanna, Pitt. in error.

vs

Error to Warren.

Peoples National Bank of

Monmouth, Ill. Deft. in error.

Whitney, P. J.

Suit was brought in the court below by Hess V. Hanna plaintiff in error, hereinafter styled plaintiff, against the People's National Bank of Monmouth, Illinois, defendant in error, hereinafter styled defendant, to recover money alleged by plaintiff to have been deposited with the defendant. The declaration consisted of the common counts in which were pleaded the general issue, the five and ten year statute of limitations and payment. Issue was joined and a trial had resulting in a verdict and judgment for defendant on which this writ of error is prosecuted. The pleas of the statutes of limitations seem not to have been relied on and therefore they may be disregarded on this hearing. No evidence was offered in support of the plea of payment, that is that payments were made to plaintiff or her duly authorized agent, and therefore nothing will be considered as to that plea as a defense. The case came before this court squarely on the question, did the plaintiff deposit \$1300.00 with defendant.

Certain facts about the case are undisputed; (1) a draft for \$1300.95 was issued by the insurance company mentioned in the evidence in the year 1898, payable to plaintiff; (2) plaintiff then had a husband living named J. H. Hanna, with whom she was then living, and with whom she continued to live until 1907, the year of his death; (3) that plaintiff never had any banking business with de-

Plaintiff in error, hereinafter styled Plaintiff, against
 The People's National Bank of Monmouth, Illinois, defendant
 in error, hereinafter styled defendant, to recover money
 alleged by plaintiff to have been deposited with the de-
 fendant. The declaration consisted of the common counts to
 which were pleaded the general issue, the five and ten
 year statute of limitations and payment. Issue was joined
 and a trial had resulting in a verdict and judgment for
 defendant on which this writ of error is prosecuted.
 The plea of the statute of limitations seem not to have
 been relied on and therefore they may be disregarded on this
 hearing. No evidence was offered in support of the plea of
 payment, that is that payments were made to plaintiff or
 were duly authorized agent, and therefore nothing will be
 considered as to that plea as a defense. The case comes
 before this court squarely on the question, did the plain-
 tiff deposit \$1300.00 with defendant.
 Certain facts about the case are undisputed; (1)
 mentioned in the witness in the year 1908, payable to
 plaintiff; (2) plaintiff then had a woman living house
 and continued to live until 1907, the year of his death;
 (3) that plaintiff never had any banking business with de-

Error to Writ.

The People's National Bank of

Plaintiff in error.

Plaintiff, v. J.

This case brought to the court before the People's National Bank of Monmouth, Illinois, defendant

2

defendant from the time it is claimed she made the deposit of the draft in question, March 5, 1898, until the time she demanded the money of the defendant in the spring of 1913, a period of fourteen years; (4) that plaintiff's husband died in 1907.

Plaintiff tried the case on the claim that she deposited the \$1300.00 and the defendant tried the case on the claim that plaintiff's husband deposited the draft payable to and endorsed by his wife in his wife's name, but as his own money, and checked it out as his own money, but by checks drawn in his wife's name. If the husband in fact made the deposit he had the clear legal right to deposit in his wife's name so that he could draw checks against it. Plaintiff testified that she took the draft to the bank on March 5th, 1898, and wrote her name on the back thereof by the direction of the cashier and deposited it and received the pass book offered in evidence and took it home and placed it in a bureau drawer and kept it there from that time until March 1913, when she presented it to the bank and they told her there were no funds. Afterward, in September 1913 she drew a check for \$1300.00 and took it to the bank with witnesses and the bank refused payment. Two officers of the bank who were then the cashier and the assistant cashier, and who are now the president and cashier thereof, testified that this draft was not brought to them by the plaintiff at all and that she never was in their bank concerning it until March or April 1913; but that on March 5, 1898, her husband J. H. Hanna, came to the bank with this draft endorsed in blank by his wife and told the bank it was insurance on his life and was his money, but that he wished to deposit it in the name of his wife, and

Case No. 1234

John V. Hannan, Plaintiff, vs.

The People's National Bank of

Monmouth, Ill.

Defendant.

Filed for record in error.

Witness, P. J.

Suit was brought in the court below by John V. Hannan

against the People's National Bank of Monmouth, Illinois, defendant

in error, hereinafter styled defendant, to recover money

alleged by plaintiff to have been deposited with the de-

fendant. The declaration consisted of the common counts to

which were pleaded the general issue, the five and ten

year statute of limitations and payment. Issue was joined

and a trial had resulting in a verdict and judgment for

defendant on which this writ of error is prosecuted.

The plea of the statutes of limitations seem not to have

been relied on and therefore they may be disregarded on this

appeal. No evidence was offered in support of the plea of

payment, that is that payments were made to plaintiff or

any duly authorized agent, and therefore nothing will be

assumed as to that plea in a defense. The case comes

before this court squarely on the question, did the plain-

tiff deposit \$1300.00 with defendant.

Certain facts about the case are undisputed; (1)

a draft for \$1300.00 was issued by the insurance company

mentioned in the witness in the year 1908, payable to

plaintiff; (2) plaintiff then had a nephew living named

J. H. Hannan, with whom she was then living, and with whom

she continued to live until 1911, and prior to that time

(3) that plaintiff never had any banking business with de-

7

defendant from the time it is claimed she made the deposit of the draft in question, March 5, 1898, until the time she demanded the money of the defendant in the spring of 1913, a period of fourteen years; (4) that plaintiff's husband died in 1907.

Plaintiff tried the case on the claim that she deposited the \$1300.00 and the defendant tried the case on the claim that plaintiff's husband deposited the draft payable to and endorsed by his wife in his wife's name, but as his own money, and checked it out as his own money, but by checks drawn in his wife's name. If the husband in fact made the deposit he had the clear legal right to deposit in his wife's name so that he could draw checks against it. Plaintiff testified that she took the draft to the bank on March 5th, 1898, and wrote her name on the back thereof by the direction of the cashier and deposited it and received the pass book offered in evidence and took it home and placed it in a bureau drawer and kept it there from that time until March 1913, when she presented it to the bank and they told her there were no funds. Afterward, in September 1913 she drew a check for \$1300.00 and took it to the bank with witnesses and the bank refused payment. Two officers of the bank who were then the cashier and the assistant cashier, and who are now the president and cashier thereof, testified that this draft was not brought to them by the plaintiff at all and that she never was in their bank concerning it until March or April 1913; but that on March 5, 1898, her husband J. H. Hanna, came to the bank with this draft endorsed in blank by his wife and told the bank it was insurance on his life and was his money, but that he wished to deposit it in the name of his wife, and

...the time it is claimed she made the deposit of
...March 6, 1903, until the time she
...the money of the defendant in the spring of 1913,
...; (4) that plaintiff's husband

...tried the case on the claim that she depos-
...\$1300.00 and the defendant tried the case on
...the claim that plaintiff's husband deposited the money
...and endorsed by his wife in his wife's name, but
...and checked it out as his own money, but
...in his wife's name. It was husband's money. It was
...the deposit in the name of his wife, but
...as that he would have known if it
...that she took the draft to the bank on
...and wrote her name on the back thereof by
...of the cashier and deposited it and received
...and took it home and
...it in a bureau drawer and kept it there from that
...March 1913, when she presented it to the bank
...in 1913. Afterward, in Sep-
...she drew a check for \$1300.00 and took it to
...and the bank returned payment. Two
...of the bank who were then the cashier and the
...and cashier, and who are now its president and cashier
...that this draft was not brought to them
...that she never was in there
...March or April 1913; but that
...this draft endorsed in blank by his wife and told the
...on his wife and was his money, but
...it in the name of his wife, and

that he would check it out. The bank then issued to him the pass book in the name of his wife and delivered it to him. The bank produced in evidence fifteen checks in all in the handwriting of J. H. Hanna and all signed either in the name of Emma V. Hanna or Emma V. Hanna by J. H. Hanna, by which within two months and twelve days after the deposit was made, J. H. Hanna drew the entire amount of the deposit. Plaintiff never drew any checks against the deposit until the check she presented in September 1913, just before suit was begun.

After the death of plaintiff's husband, which occurred in 1907, plaintiff stated to several people, who were produced as witnesses, that she had told them she had no money. The proof showed that plaintiff after her husband's death received quite a sum of money and placed it in another bank, taking from that bank an agreement to pay her four per cent interest on the deposit. Her husband left no estate and after his death she went out to work two days of the week at ironing and canvassing for various articles and did this, as she testified to obtain a living. It is practically inconceivable that plaintiff, who seems to have been intelligent and whose husband was a lawyer, should have held \$1300.00 in the bank for fourteen years without interest when she knew that interest could be obtained upon the money, and it is also inconceivable that she would work at common service as a domestic in order to get means on which to live when she had such a sum in the bank.

We think from all the evidence the jury were warranted in concluding the bank officers gave a correct account of the transaction and the verdict having had the approval of the trial judge, ought not to be disturbed by us unless

that the check is out. The bank then issued to him
the check in the name of his wife and delivered it to
her. The bank produced in evidence fifteen checks in all
in the handwriting of J. H. Hanna and all signed either in
the name of Hanna V. Hanna or Hanna V. Hanna by J. H. Hanna,
by which within two months and twelve days after the deposit
the wife, J. H. Hanna drew the entire amount of the deposit.
The plaintiff never drew any checks against the deposit until
the check was presented in September 1912, just before the
trial.

After the death of plaintiff's husband, which occur-
ed in 1907, plaintiff stated to several people, who were
present as witnesses, that she had told them she had no
money. The proof shows that plaintiff after her husband's
death received quite a sum of money and placed it in another
bank, stating that she had no money at her bank.
She went to work on the deposit. Her husband left no estate
of after his death she went out to work two days of the week
at cleaning and canning for various parties and did
not, as she testified to obtain a living. It is practically
inconceivable that plaintiff, who seems to have been intel-
ligent and whose husband was a lawyer, should have held
\$100.00 in the bank for fourteen years without interest when
she knew that interest would be credited for the money,
and it is also inconceivable that she would work at common
service as a domestic in order to get means on which to live
when she had such a sum in the bank.

We think from all the evidence the jury were warranted
in concluding that plaintiff gave a correct account of
the transaction and the verdict having had the approval of
the trial judge, ought not to be disturbed by us unless

there is error in the giving of instructions, or the rejection or admission of evidence which would seem to demand a reversal.

Complaint is made that the court admitted the fifteen checks by which the husband drew out this money within two months and twelve days after the deposit was made. This was not done for the purpose of proving payment to plaintiff under the plea to that effect, but it was to avoid leaving the jury to suppose that the bank still held this money, and also for its force in tending to corroborate the bank officers.

It is inconceivable that if this draft had been deposited by the plaintiff in person without any direction as she claims, that the bank officers should within a few days thereafter begin to pay it out to the husband on checks drawn by him and not in her handwriting. The way in which they did pay the money out is the more reasonable way in which to view the deposit and the withdrawal of the money, as a business transaction, that is that he deposited this money in his wife's name and under an arrangement by which he could check it out.

Complaint is made of the giving of the sixth instruction for the defendant. That instruction is in substance that the burden of proof is upon the plaintiff to prove her case by the preponderance of the evidence, and the complaint is that the giving of it put upon the plaintiff the burden of proof under the plea of payment. If there had been any attempt to prove the truth of that plea, this instruction would have been erroneous, but the checks offered in evidence were not for the purpose of proving the plea of payment, and they had no tendency to prove the plea. There was

There is error in the giving of instructions, or the re-
sult of admission of evidence which would open to demand
a reversal.

The court is asked that the court admitted the lit-
tles which it took the record from and this money - which
was taken and twelve days after the deposit was made. This
was the case of the bottom of the deposit is distinctly
shown that it is not correct, but it was so clearly
the fact is that the money was not taken.
The fact is that the force in tending to corroborate the bank
evidence.

It is inconceivable that if this draft had been
admitted by the plaintiff in person without any evidence
as to the same, that the bank officers should within a few
days thereafter begin to pay it out to the husband on
the draft drawn by him and not in her handwriting. The way
in which they did pay the money out is the more reasonable
way in which to view the deposit and the withdrawal of the
money, as a business transaction, that is that he deposited
the money in his wife's name and under an arrangement by
which he could check it out.

Complaint is made of the giving of the sixth in-
struction for the defendant. That instruction is in substance
that the burden of proof is upon the plaintiff to prove her
case by the preponderance of the evidence, and the complaint
is that the giving of it put upon the plaintiff the burden
of proof under the plea of payment. If there had been any
evidence to prove the truth of that plea, this instruction
would have been erroneous, but the checks offered in evi-
dence were not the ones as to which the plea was made
and they had no tendency to prove the plea. There was

no other evidence offered by the defendant under the plea of payment.

As to the other instructions complained of and the modification of some of plaintiff's instructions, it is sufficient to say that in the main they are correct, and that if in some slight particulars they are incorrect, we do not think the error sufficiently grievous to reverse a verdict which is clearly sustained by the preponderance of the evidence and by the reasonable probabilities of the case.

Seeing no reversible error in the record in any respect, the judgment of the court below is affirmed.

in other words, of the fact that the law is not a mere collection of rules, but a system of principles which are applied to the facts of the case.

As to the other instructions contained in the law, it is well known that some of the instructions are of a general nature, and others are of a specific nature. It is also well known that the law is not a mere collection of rules, but a system of principles which are applied to the facts of the case. It is also well known that the law is not a mere collection of rules, but a system of principles which are applied to the facts of the case.

Being no reversible error in the record, it is not necessary to reverse the judgment of the court.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

5771

173

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

182 I.A. 534

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5771.

State Bank of New Boston, appellant.

vs

Appeal from Mercer

Josie F. Bridger, appellee.

Whitney, F. J.

This is a suit on a note for \$711.96 dated April 12, 1907, given by Josie F. Bridger, who is mentioned in the pleadings in a suit brought by the State Bank of New Boston against Kate B. Livingston and Frank Livingston, which is on the docket of this court at the present time term as General Number 5770, Term Number 25. The pleadings and proceedings seem to be exactly the same as in that case and for the reasons stated in the opinion filed in that case, the judgment of this case is affirmed.

Vol. 10, p. 111.

State Bank of New Boston, complainant.

Answer, New Boston.

Joel T. Robinson, appellee.

May, 1897, p. 11.

This is a suit on a note for \$11,000 dated April

15, 1897, given by Joel T. Robinson, who is defendant

in the proceedings in a suit brought by the State Bank of
New Boston against Kate B. Livingston and Frank Livingston.

There is no record of this case in the present case

and no record of the \$11,000 note given by Joel T. Robinson.

and according to the records of the State Bank of New Boston
and the reasons stated in the opinion filed in that case,

the judgment of this case is affirmed.

STATE OF ILLINOIS, {
SECOND DISTRICT. ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this second day of August, in the year of our Lord one thousand nine hundred and thirteen.

Clerk of the Appellate Court.

5773

Whitney, Cg.

174

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk. 1821A. 535

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5773.

True A. Miller, appellee

vs

Appeal from Peoria,

P.M. Carney et al appellants.

Whitney, P. J.

True A. Miller, appellee, sued P. M. Carney and wife before a justice of the peace to recover for work performed in paper hanging. The case went on appeal to the circuit court where two trials were had, the last trial resulting in the verdict for \$99.50 for appellee. Appellants interposed a motion for a new trial, specifying the grounds of said motion in writing as follows:- (1) The court erred in not granting these defendants a continuance on the motion of defendants upon the affidavits read to the court and now on file; (2) the verdict of the jury is against the law and the evidence in this case. The motion for a new trial was overruled and judgment entered on the verdict, from which this appeal is prosecuted. When the case was called for trial in the circuit court, appellants moved for a continuance on account of the illness of the appellant, Mrs. Carney, which was denied and it is claimed this was error. It was not shown that Mrs. Carney was to be a witness on the trial and that if she was to be a witness, there was nothing appearing in any affidavit filed in support of the motion showing what was expected to be proved by her, so as to give appellee an opportunity to admit she would so testify, as the statute provides. Neither was it shown her presence was indispensable for the management of the suit. There was no error in denying the motion. Appellee's contention was that he made a contract with appellants by which he was to do certain work and take his pay in board, and that he did that

Oct. 10, 1911.

THE COURT, Appellate.

Appeal from Texas.

17

THE COURT IS OF THE OPINION.

1911, 11, 11.

THE COURT, Appellate, with T. H. Gurney and six

judges of the bench to review for the purpose

of the case. The case was heard on the merits

and the court was divided, the majority being

in the ratio of 5 to 3 for appellee. Appellate inter-

posed a motion for a new trial, specifying the grounds

of said motion in writing as follows: (1) The court erred

in not granting these defendants a continuance on the motion

of defendants upon the affidavit read to the court and now

in file; (2) the verdict of the jury is against the law and

the evidence in this case. The motion for a new trial was

overruled and judgment entered on the verdict, from which

this appeal is prosecuted. When the case was called for trial

at the circuit court, appellee moved for a continuance

on account of the illness of the appellant, Mrs. Gurney,

which was denied and it is claimed this was error. It was

not shown that Mrs. Gurney was to be a witness on the trial

and that it was to be a witness, there was nothing apparent

and in any affidavit filed in support of the motion showing

that she was expected to be proved by her, so as to give appellee

an opportunity to admit she would so testify, as the statute

provided. Neither was it shown her presence was indispens-

able for the management of the suit. There was no error

in denying the motion. Appellee's contention was that he

made a contract with appellee by which he was to do con-

crete work and take his pay in bonds, and that he did that

work and received board for all but \$2.85, which sum of \$2.85 he has disclaimed trying to recover in this case; that he then ceased to work for them for sometime and after board was closed to paper certain rooms for board and declined to do it unless he was paid in money, and was then hired to do the work for money; that he prepared ten rooms at the agreed price of \$7.00 per room; five rooms at the agreed price of \$8.00 per room, and did eight days work on a hall at \$20.00 making \$100.00; that he received \$70.50 in board, leaving \$29.50 due him. This is the amount that he recovered.

The contention of appellants is that there never was a second contract and that the work was to be paid for in board and that they were ready and willing to furnish appellee the board. This contention furnished a controverted question of fact, upon which the jury found for the appellee. It is also contended the record does not show how many days he worked on the hall or the price he was to receive therefor, and hence that the charge of \$20.00 is too high.

The law of this state is that the question whether the evidence is sufficient to support the verdict can only be preserved for review in this court upon a motion for a new trial presented in the court below, where as here, the case is tried by jury and if upon said motion no written points are filed, then all questions which could be heard upon a motion for a new trial are considered to be ~~presented~~ presented, but if the points upon the motion for a new trial are filed, they constitute a waiver of all other points and only the points so filed can be argued. *Yarber v Chicago & Alton Ry. Co.* 235 Ill. 589.

There is evidence appellee worked in the hall and there was evidence indicating that his services were worth \$2.50 per day. Appellee was asked expressly the number

and received bond for all but \$2.32, which sum of

he declined trying to recover in this case;

that he then ceased to work for them for sometime and after

and was asked to repair certain rooms for board and declined

as it unless he was paid in money, and was then hired to

as the work for money; that he repaired ten rooms at the

price of \$7.00 per room; five rooms at the agreed price

of \$5.00 per room, and the eight days work on a hall at

\$12.00 - \$100.00; and he received \$100.00 in cash, and

\$1.30 due him. This is the amount that he recovered.

The testimony of the witness is that that day was

a very contract and that the work was to be paid for in

board and that they were ready and willing to furnish

board. This testimony is in conflict with the evidence

on of fact, upon which the jury found for the appellee.

It is also contended the record does not show how many

rooms he worked on the hall or the price he was to receive

therefor, and hence that the charge of \$20.00 is too high.

The law of this state is that the question whether

the evidence is sufficient to support the verdict can only

be reserved for review in this court upon a motion for a

new trial presented in the court below, where as here,

the case is tried by jury and it upon said motion no written

points are filed, then all questions which could be raised

upon a motion for a new trial are considered to be waived

presented, but if the points upon the motion for new trial

are filed, they constitute a waiver of all other points not

filed. The points so filed can be argued. *Yarber v Chicago*

1st Dist. App. 2d Div. 1898.

There is evidence appellee worked in the hall and

there was evidence indicating that his services were

valued at \$2.50 per day. Appellee was asked expressly the number

of days he worked there, and the answer was kept out by objection interposed by appellants. If that fact does not anywhere appear in this record, then it is true that the precise foundation for \$20.00 of the verdict is not shown. The motion for a new trial stated that the verdict was against the law and the evidence, but in order to avail of that in that case, it was also necessary for appellants to assign for error in this record the refusal of said motion for a new trial. The refusal of that motion is not assigned for error in this court. Appellants show in their abstract there was such an assignment of error, but their statement is not supported by the record itself. There being no assignment of error questioning the ruling of the court upon the motion for a new trial, the supposed excessive character of the verdict is not presented for our consideration.

It is also contended the instructions given for appellee are incorrect and the ruling of the court upon those instructions is assigned for error.

Where no motion for a new trial is interposed, ruling on the instructions is preserved for review. *I. C. R. R. Co. v O'Keefe*, 144 Ill. 508. But where a motion for a new trial is interposed and points in writing are filed and the ruling of the court on instructions is not one of those points, then the ruling of the court on instructions is waived. *Yarber v Chicago & Alton Ry. Co.* 235 Ill. 589.

Appellants' motion for a new trial contained no reference to the ruling of the court upon instructions and that ruling was therefore waived and cannot afterward be assigned for error here.

It is assigned for error that the court erred in excluding certain evidence. The ruling of the court in

[illegible]

that respect was not included in the points filed on written motion for a new trial and for the reasons herein stated, are waived and cannot be considered here.

The record presents no reversible error for our consideration.

Judgment affirmed.

That request was not included in the points filed on
revised motion for a new trial and for the reasons herein
stated, was waived and cannot be considered here.
The record presents no reversible error for any

reason.

Judgment affirmed.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

5778

Whitney, P. J.

(175)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

182 I.A. 536

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5778

Ole Johnson, appellant.

vs

Appeal from Boone.

Gail C. Downing, appellee.

Whitney, P. J.

This is an action brought by Ole Johnson appellant against Gail C. Downing, appellee, to recover damages for the shooting of appellant's dog by appellee. A trial was had in the circuit court and resulted in a verdict and judgment against appellant, from which he appeals to this court. In the brief and argument appellant presents only the following as the points relied on for a reversal.

(1) The court erred in admitting evidence as to the general character and reputation of the dog for viciousness; (2) Error in both instructions given for defendant; (3) Error in refusing instructions asked by plaintiff,

In a preliminary way appellant also speaks of the improper remarks by the court, but in his brief and argument he in no way points out in what way or why the remarks of the court were improper. Prior to the time the dog was shot the evidence shows attacks by the dog upon several persons one of whom was bitten by the dog. It appears from the evidence that appellee knew of these attacks and knew that Helen Olsen, a little girl, had been bitten, and appellee's wife had twice been driven into the house by the dog, and the dog had chased appellee's chicken; and that the morning before the shooting a man had told appellee that he had been attacked by the dog. Appellee heard the dog was in his yard and started out with a rifle and the dog came at him and growled and apparently he thought the dog was going to attack him and he shot, inflicting such injuries

Ex. 101, 102

Ex. 103, 104, 105

vs
Appellant from Illinois

Cell 6, Downing, Appellant

Illinois, P. 1.

This is an appeal brought by the Appellant

against Cell 6, Downing, Appellant, in which he appeals from

the verdict of a jury in the Circuit Court of Cook County, Illinois, in a case in which he was charged with the murder of a woman named Mary Jane Smith.

The Appellant claims that the jury was misled by the evidence presented to it.

In the first and argument Appellant presents only

the following as the points relied on for a reversal:

(1) The jury was misled by the evidence presented to it.

(2) The jury was misled by the evidence presented to it.

(3) The jury was misled by the evidence presented to it.

In the following instructions given by the court:

In a preliminary way a witness also speaks of the

proper manner by the court, but in his brief and argument

he is no way points out in what way or why the remarks of

the court were improper, when to the time the dog was shot

the evidence shows that the dog was shot several persons

and of them was killed by the dog. It appears from the

evidence that Appellant knew of these persons and knew that

John Olson, a little girl, had been bitten, and Appellant's

like had been bitten into the house by the dog, and

the dog had chased Appellant's children, and that the

dog before the shooting a man had told Appellant that he

had been attacked by the dog. Appellant heard the dog was

this young man started out with a rifle and the dog came

at him and growled and he started to shoot the dog was

going to attack him and he shot, inflicting some injuries

that it became necessary to kill the dog. Under such circumstances, it was for the jury to say whether he was justified in shooting.

Appellant complains of the admission of evidence offered by appellee of the general vicious character or reputation of the dog. It will be found, however, by examining the record, that each time appellant objected to that testimony, and his objection was overruled, the witness did not answer the question, but went off on some other subject, and that other witnesses testified to the general character or reputation of the dog being bad without appellant's objecting to the testimony. We think the two instructions given for appellee were proper under the evidence. As to appellant's refused instructions, we think each of them bad. The first and second ignored the testimony of attacks the dog had made on others and the fact that appellee knew of some of those attacks. The third and fourth refused instructions were bad, because they left it to the jury to determine what was a legal reason for killing the dog, the third and fourth instructions containing the language in substance that the defendant was liable if he killed the dog without any legal reason for so doing.

Seeing no reversible error in the record, the judgment of the court below is affirmed.

that it became necessary to kill the dog. Under such cir-
cumstances, it was for the jury to say whether he was jus-
tified in killing.

Amplified complaint of the admission of evidence

offered by appellee of the general vicious character of

reputation of the dog. It will be found, however, by

examining the record, that such time appellant objected to

that testimony, and his objection was overruled. The ap-
pellee did not answer the question, but went off on some other

subject, and that other witness testified to the general

character or reputation of the dog being that

appellant's objection to the testimony. We think the two

testimonies given for appellee were proper under the cir-

cumstances. It is appellant's burden to show that

each of them had. The first and second ignored the testimony

of appellee the dog had made on others and that it was

known to some of those attacks. The third and fourth

refused testimony were bad, because they left it to the

jury to determine what was a legal reason for killing the

dog, the third and fourth testimony containing the law

goes in substance that the defendant was liable if he

killed the dog without any legal reason for killing.

Seeing no reversible error in the record, the judge

that at the court's order is affirmed.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

THE UNIVERSITY OF CHICAGO
LIBRARY
The University of Chicago Library
has acquired the following items
from the collection of the
University of Chicago Press
and the University of Chicago
Library. The items are
as follows:

5784

Whitney, P. J.

177

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

182 I.A. 539

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5784.

Spring Valley Coal Co. appellee

vs

Appeal from Bureau.

John Framassetta, appellant.

Whitney, P. J.

In 1904 appellee conveyed to appellant by warranty deed certain real estate with the covenant in the deed that the premises should never be used for the sale or retail thereof of any intoxicating liquor of any kind, either malt, fermented or spiritous. On December 5, 1910 appellee filed its bill against appellant charging that he was selling intoxicating liquor at retail on said premises in violation of such covenant and praying for a perpetual injunction restraining him from making such sales. Issue was joined on the bill and the cause was referred to the master to take the proofs therein and report the same with his conclusions of law and fact. The master took said proofs and reported the same with his conclusions. Objections were interposed before the master and overruled by him, and exceptions were filed in the circuit court and a decree was entered overruling such exceptions and decreeing a perpetual injunction as prayed in the bill from which this appeal is prosecuted.

This is a civil proceeding and the rules as to the kind of evidence and the quantum of proof are the same as in other civil cases. The allegations of the bill could be proved by direct or circumstantial evidence, or both. If facts and circumstances are proven which lead the mind with certainty to the conclusion that other facts and circumstances are true then such latter facts and circumstances may be accepted and acted upon. (. P. & P. U. Ry. Co. v

Wm. H. Hays,

State, Wm. H. Hays,

Special Agent,

NY

John Thompson, Esq.,

Attorney, P. M.

In 1904 evidence conveyed to appellant by

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that the business should never be used for the sale or

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conducted on business. On December 8, 1910 evidence

the bill against appellant charging that he was selling

representing himself as retail on said premises in violation

of such government and keeping for a personal

representing him from making such sales. There was joined

in the bill and the cause was returned to the master

and the people therein and report was made with his

allegation of law and fact. The master took

submitted the case with his conclusions. On

presented before the master and reviewed by him, and

exceptions were filed in the circuit court and a

motion was made for such exceptions and

and attention as given in the bill from which this

is

This is a civil proceeding and the rules

the kind of evidence and the question of

as in other civil cases. The allegations of the bill

proved by direct or circumstantial evidence, or

facts and circumstances and proven which

materially to the conclusion that

there are facts and circumstances

may be considered and acted upon. (P. M. H. Hays, Esq.,

Clayberg, Admr, 107 Ill. 644.

Here the proof shows all of the usual things and acts that go with the ordinary dram shop wherein intoxicating liquor is sold including the selling of drinks and the mind is led irresistibly to the conclusion that intoxicating liquor was being sold on the real estate in question. No evidence was offered by the appellant.

We think the proof justified the decree and is therefore affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

5786

Whitney, J. J.

178

AT A TERM OF THE APPELATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

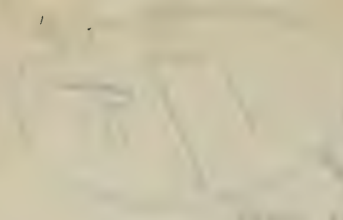
CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

182 I.A. 540

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 5786.

Charles I. McNett, Appellee

vs

Appeal from Maine.

Donald J. McDonald, Appellant.

Whitney, P. J.

This is an action of assumpsit in which the declaration ~~summarizes~~ consists of the common counts laying damages at \$1000.00. To this declaration a plea of the general issue was interposed; there was a verdict for appellee and a motion for a new trial which was overruled and judgment was entered on the verdict from which this appeal is prosecuted. The record does not show the evidence on which the verdict and judgment are based, nor do any of the affidavits that are shown in the abstract of the record state what appellee's cause of action is, therefore, it cannot be determined what is the nature of appellee's suit. It may have been anything for which a recovery could be had under the common counts and as far as said affidavits are concerned none of them disclose any defense from which this court can determine that such defense was sustainable under the plea of the general issue.

The whole basis of the appeal is that the trial court exceeded its discretionary powers in refusing to ^{set} aside the verdict which had been obtained in the absence of appellant and his attorneys, and in refusing to grant a new trial of the case for that reason. The cause was, by agreement of the parties and an order duly entered on September 16, 1912, set down for trial, to follow the criminal calendar. On September 23, 1912 it appearing that the criminal calendar had been finished the case was called and set down for hearing on that day, appellant not appearing

Vol. 10, 1912

Charles E. Smith, Plaintiff

vs

Charles E. Smith, Defendant

Verdict, p. 1.

This is an action of assumpsit in which the
plaintiff seeks recovery of the sum of one hundred
dollars at \$100.00. To this declaration a plea of the
general issue was interposed; there was a verdict for the
plaintiff for a new trial which was overruled and judgment
was entered on the verdict from which this appeal is
taken. The record does not show the evidence on which
the verdict and judgment are based, nor do any of the
pages that are shown in the abstract of the record state
the evidence on which the verdict is based, therefore, it cannot
be determined what is the nature of appellee's suit. It
may have been anything for which a recovery could be had
under the common counts and as far as said affidavits are
concerned none of them disclose any defense from which
this court can determine that such defense was unavailable
under the plea of the general issue.

The whole basis of the appeal is that the trial court
misapprehended its discretionary powers in refusing to grant a
new trial, which had been obtained in the absence of
appellee and his attorneys, and in refusing to grant a
new trial of the case for that reason. The case was, by
agreement of the parties and an order duly entered on
September 18, 1912, set down for trial, to follow the civil
trial calendar. On September 23, 1912 it appearing that the
civil trial calendar had been finished the case was called and
set down for hearing on that day, and judgment was rendered.

in person nor by counsel. A jury was impaneled and heard the evidence and rendered a verdict for appellee for \$1000.01. This motion for a new trial followed. Numerous affidavits are shown in the abstract of the record but whether they were filed on the hearing of the motion for a new trial or not does not appear from the abstract, nor does it appear from the abstract whether any of said affidavits were used in evidence. From none of the affidavits does it appear appellant could have reduced appellee's recovery. We cannot determine from the record that the recovery would have been less had the appellant with all of his counsel been present at the trial putting in a defense. It is not shown that appellant had a meritorious defense to appellee's cause of action. It appears the case was called for trial on September 18, 1913; that appellee was ready and that appellant was not; that appellant wanted two or three days time because of matters his attorneys were interdicted in in the courts of Chicago, and as above stated, by agreement the case was set down for hearing following the criminal docket as above stated.

It appears appellant had three attorneys, two of them appear to have been engaged in a suit in Chicago about September 18; it appears that appellant did not attend the trial court on September 23, the day the suit was called and tried, and it also appears that one of his three attorneys was not engaged in any trial in Chicago on that day. It also appears that his attorneys got into communication with the clerk of the trial court on September 23, and the attorneys claim that the clerk told them that he thought it would not be reached, but the clerk made an affidavit that he told them very likely it would be reached. There was at this term but two weeks of jury work and it

in which not by counsel. A jury was empanelled and heard

the evidence and rendered a verdict for appellee for

\$500.00. This motion for a new trial followed. Numerous

affidavits are shown in the abstract of the record but

whether they were filed on the hearing of the motion for a

new trial or not does not appear from the abstract, nor

does it appear from the abstract whether any of said affi-

davits were used in evidence. From none of the affidavits

does it appear whether appellee could have obtained a new

verdict. It would certainly seem the case that the ver-

dict would have been lost had the appellant with all of

the money then received at the trial satisfied his debt.

It is not shown that appellant had a satisfactory defense

in appellee's cause of action. It appears the case was

called for trial on September 18, 1918; that appellee was

sick and that appellant was not; that appellant wanted

two or three days more to prepare his defense.

was intended in the courts of Chicago, and as

above stated, by agreement, the case was not down for hear-

ing. Following the original docket as above stated,

It appears appellant had three attorneys, two of whom

appear to have been engaged in a suit in Chicago about

September 18; it appears that appellant did not attend

the trial court on September 25, the day the suit was

called and tried, and it also appears that one of his

three attorneys wanted engaged in any trial in Chicago on

that day. It also appears that his attorneys got into

trouble with the clerk of the court and that

25, and the attorneys claim that the clerk told them that

he thought it would not be removed, but the clerk asked

affidavits that he told them very likely it would be removed,

There was at this time but two weeks of jury work and it

was nearly through, and if the case had been put off until the termination of the business of appellant's attorneys in Chicago, appellee would have been deprived of a jury trial at that term, and it seems that the case had already been postponed for one term by the non-attendance of appellant. This appeal involves merely the question of whether or not the trial judge exceeded his discretionary powers and was arbitrary in his refusal to set aside the verdict and grant a new trial, and it not appearing in the record that the nature of appellee's suit was nor that if any, defense appellant had thereto, and a meritorious defense not being shown by the record, we are not in a ~~xxx~~ position to find that the trial court abused the discretion that the law gave him.

Judgment affirmed

Carnes, Justice, took no part.

and nearly twenty, and if the case had been put off
until the termination of the business of the plaintiff's
attorneys in Chicago, questions would have been averted
on a jury trial at that time, and it seems that the case
had already been postponed for some time by the business-
ness of the plaintiff. This counsel further stated that
question of whether or not the trial judge exceeded his
discretionary power was not material in his opinion, and
that he was not going to raise a new issue, and if not
satisfying in the court that the merits of the plaintiff's case
was not that it was, defense counsel had thereto, and a
motion for judgment was not being shown by the court, as
the fact in a new position to find that the trial court
exceeded its discretion that the law gave him.

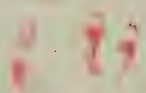
Argument continued

Court, Justice, took no part.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.



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Whitney P.J.

180

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

1821A.546

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 5795.

Mary Hanson, appellee

vs

Appeal from City Ct. Elgin.

Julius Nolting, et al

appellants.

Whitney, P. J.

This is an action in case brought by Mary Hanson, appellee, to recover damages for personal injuries alleged to have been caused by the negligence of appellants in having some woven wire on the sidewalk in front of their store in Elgin, over which appellee tripped and fell onto the cement sidewalk.

The declaration consisted of four counts, three of them alleging negligence generally of having placed the woven wire on the sidewalk contrary to their duty not to obstruct the walk, and another alleging the violation of an ordinance of the city of Elgin, which ordinance we think is not shown by the evidence to have been violated and therefore nothing further need be said about that count or the evidence in relation thereto. To this declaration the plea of not guilty was filed. A jury trial was had resulting in a verdict for appellee for \$500.00 and motions for a new trial and in arrest of judgment were interposed and overruled and judgment entered on the verdict from which this appeal is prosecuted.

The errors assigned are error in refusing to take the case from the jury at the close of plaintiff's case, and at the close of all the evidence respectively; error in denying the motions for a new trial and in arrest of judgment, respectively; error in not directing the jury to find the defendants not guilty, and error in refusing the

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Journal of Management Education 26(8)

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• *Journal of Management Education* 24(1): 10-18

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Department of Education

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peremptory instructions, all in effect that the plaintiff had not proven her case. No questions are raised to rulings on evidence or instructions. It is practically conceded that the woven wire was placed on the sidewalk near the outer edge thereof by appellants, and that appellee passed along the walk where the wire was, going south - appellants store facing east and the street running north and south. That appellee tripped and fell on the woven wire and injured herself more or less is established by the testimony of appellee and appellant Julius Nolting. Ray Cleary also testified to seeing appellants employees measuring the wire on the sidewalk and to seeing appellee catch her foot on the wire and fall. The case therefore, resolves itself into one in which the only questions are were appellants guilty of negligence in placing the woven wire on the sidewalk, and was appellee in the exercise of due care for her own safety at and just before the time she fell over the woven wire. According to the witness Cleary, corroborated by appellant Julius Nolting, the wire that appellee fell on had been cut off of a roll and was lying on the outer edge of the walk toward the pavement; that he saw appellants employees unrolling the wire and then one of the employees left some small object on the north end of the wire where appellee fell, and walked up to the other employee and they then cut the wire off the roll. According to appellants evidence the wire was three feet in width and was cut off from a roll 150 feet long; that it was measured and cut off as near the outer edge as could be of a ten foot sidewalk; that the roll from which the piece was cut stood on the north end of the piece that had been cut off, holding down the outer edge and about two feet from the outer edge; that the wire was measured and cut off on the sidewalk because

the alley was muddy and the sidewalk was the only dry place they had for that purpose, and that they had been in the habit of using the sidewalk for such purpose on rainy days or when the alley was muddy.

The case of Village of Kewanee v Depew 80 Ill. 119 relied on by appellants is not in point because the facts in that case are that the person injured on the sidewalk knew for several days of the defect which caused his injuries. In that case the supreme court says "Had he not known of the defect he might, probably, have been justified in assuming that the sidewalk was safe and in acting upon that hypothesis". The cases cited by appellants in 75 Ill. App. 198; 100 Ill. App. 314; 120 Ill. App. 609; and 147 Ill. App. 406 all turn on the point that the plaintiff knew previously the condition of the place in which the injury occurred.

In this case even if appellee had looked, her attention would have been drawn to the object nearest her as she was approaching, viz: - the upright roll of wire, which according to the testimony contained at least 125 feet of woven wire rolled up, making an object 3 feet high, and which stood according to appellants own evidence at the north end of the piece cut off and about 2 feet from the outer edge of the piece cut off. Appellee might have seen the roll and passed around it and not recall that she noticed it. One sometimes unconsciously sees objects so as to avoid running into them without being able to recollect afterward that he even saw them. Conceding that appellants evidence is correct as to the location of the unrolled wire, we are of the opinion that fact alone is sufficient excuse to appellee for not seeing the piece of wire that

had been cut off which ran to the south of the upright roll. It would seem to this court, as we believe it would to anyone, that no one is bound to more than a reasonable use of their eyesight. Undoubtedly, the piece of wire cut off because it had been previously part of a roll, curled up at the corners where the upright roll did not touch it thus furnishing an obstruction on which appellee tripped and fell. It cannot be said that appellee previously knew of the fact that the wire had been placed on the sidewalk because according to the evidence it had just been placed there by appellants. We are of the opinion that the jury were warranted in finding that appellee was not guilty of contributory negligence and that she was in the exercise of ordinary care for her own safety just before and at the time of the accident.

The case of Tolman & Co. v City of Chicago 240 Ill 268 is probably the latest expression of the supreme court of this state on the proper use of sidewalks and the rights of the public and individual abutting property owners therein. In that case we find this language in substance "The public has a paramount right to the use of the street in all its parts. That right is the right of all persons to pass over it freely and without impediment whenever they have occasion to do so, but it is not an absolute right in every person at all times. It is subject to such incidental and temporary partial obstruction as manifest necessity requires."

Such right to temporarily obstruct a street is, according to the authorities an exception to the general rule and according to the last case cited the moment it appears that a temporary obstruction is unnecessary that moment such

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The case of Tolman & Co. v City of Chicago 240 Ill. 501 is primarily the latest expression of the same court's view on the proper use of discretion and the rights of the public and individual citizens in property matters. In that case the City of Chicago in substance was held to have a permanent right to the use of the streets in all its parts. That right is the right of all persons to use the streets and is a right which cannot be taken away from them. It is not an absolute right. It is subject to such limitations as may be necessary for the public interest and for the safety of the public.

Each right is fundamentally abstract and is not
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and is not subject to the restriction or exception of the general law
and is not subject to the restriction or exception of the general law

obstruction becomes a nuisance. It is not enough to justify such temporary obstruction that it is required by the necessities of the person who so obstructs the street. Such obstruction must be reasonable with reference to the rights of the public.

Whether or not the use to which appellee put the sidewalk in question was reasonable with reference to the public was a question of fact. *Tolman v City of Chicago supra.*

Therefore we think the case was properly submitted to the jury to decide that question of fact. The jury found that question of fact against appellants and returned a verdict for appellee for \$500. The question of the excessiveness of the verdict was not included in the motion for a new trial or the motion in arrest of judgment, and is therefore waived. *Yarber v C. & A. Ry. Co.* 235 Ill. 589 Nor is it even mentioned in the errors assigned.

Seeing no reversible error in the record the judgment of the trial court is affirmed.

... It is not enough to justify
... that it is required by the
... of the person who is charged with the
... must be reasonable and relevant to the
... of the public.

... whether or not the use of which would be the
... is a matter of reasonable with reference to the
... of fact, taken in light of Chicago
...

... I think it was a properly admitted
... to the fact in order that question of fact. The jury found
... of fact against appellants and returned a
... the question of the ex-
... of the verdict was not included in the motion
... of the motion in error of judgment, and
... is reversible error. Taylor v. G. & A. W. Co., 223 Ill. 402
... is as mentioned in the error assigned.
... That no reversible error is shown in the record, the judg-
... of the trial court is affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

I, the undersigned, Clerk of the Appellate
Court of the State of Illinois, and keeper of the records
and minutes of the said court, do hereby certify that the foregoing is a true copy of the opinion of the
court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Chicago, this second day
of January, in the year of our Lord one thousand nine hun-
dred and nineteen.

5798

181

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

1821.A. 547

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

1878

RECEIVED

At the office of the Clerk of the Court, in the County of ... State of ...
this 1st day of ... 1878, the within and foregoing ...
has been filed for record, and the same is hereby ...

Gen. No. 5798.

J. F. Heseling, appellant.

vs

Appeal from City Ct. Sterling.

Henry Frey, Sr. appellee.

Whitney, P. J.

This is an action originating before a justice of the peace and appealed to the city court of Sterling where a trial was had resulting in a verdict and judgment for Henry Frey Sr. appellee, from which an appeal to this court is prosecuted. Numerous errors are assigned but inasmuch as the judgment must be reversed and the cause remanded for a new trial because of erroneous instructions given for appellee the facts will be reviewed but briefly.

It appears from the evidence that appellee owned and desired to sell an eighty acre farm and listed it for sale with appellant, and also with other agents. Appellant showed the farm to William Baer who was looking for land to purchase, and afterward Jonas Baer, another real estate agent, took said William Baer to see the farm and to see appellee, and a sale was closed between appellee and William Baer and appellee paid Jonas Baer a commission for selling the farm and declined to pay appellant. Appellant then commenced suit to recover commissions. Before the deal through Jonas Baer was made, appellee called up appellant on the telephone and talked with him and told him Jonas Baer was coming out with a purchaser or that a purchaser was coming to see the farm. Appellee testified that he then asked appellant if he had a purchaser, and appellant answered "No, to go ahead and sell it." Appellant testified that he told appellee he had William Baer in hand and that he could go ahead and sell to anyone else. Appellee seems to

[illegible]

be corroborated in some respects.

Inasmuch as the case is to be remanded for another trial we make no further comment on the facts except to state that there was so much conflict in the testimony, the jury should have been accurately instructed.

The law is that if an agent is employed to sell real estate by the owner, and is instrumental in bringing the owner and buyer together, and the owner concludes the sale at a less price than that at which it was listed with the agent, (which is the case here) the agent is entitled to his commission; or if the purchaser was induced to apply to the owner through the instrumentality of the agent, or through or by means employed by the agent, the agent is entitled to his commission. *Rigdon v More*, 223 Ill. 532; *Hafner v Herron* 165 Ill. 242.

There was a conflict of the evidence on the question of whether or not appellant was the procuring cause of the sale. By the second and ninth instructions given at the instance of appellee the jury was instructed in substance to find for appellee unless they believed from the evidence that appellant had established by a preponderance of the evidence that the appellant named terms to the purchaser which the latter was ready, willing and able to accept. Those instructions were vitally bad and on them the jury could have returned a verdict for appellee regardless of the evidence. The eleventh instruction given for appellee directed a verdict for appellee unless the jury believed from the evidence, among other things, that appellant was prevented from bringing about a consummation of the sale by fraud, procurement, misconduct, or fault, on the part of appellee. No attempt is made to apply this to the evidence,

be substituted in case of necessity.

It is the duty of the court to be prepared for another

trial so that no further delay in the trial may be

caused. There was no such conflict in the testimony, and

the court should have been accordingly instructed.

The law is that if an issue is raised in such a trial

as to the facts, and the facts are in dispute, the

court should not, and the facts should be left to the

jury. It is the duty of the court to be prepared for another

trial so that no further delay in the trial may be

caused. There was no such conflict in the testimony, and

the court should have been accordingly instructed.

The law is that if an issue is raised in such a trial

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as to the facts, and the facts are in dispute, the

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jury. It is the duty of the court to be prepared for another

trial so that no further delay in the trial may be

caused. There was no such conflict in the testimony, and

the court should have been accordingly instructed.

The law is that if an issue is raised in such a trial

as to the facts, and the facts are in dispute, the

court should not, and the facts should be left to the

jury. It is the duty of the court to be prepared for another

or to derive what the nature of the fraud, procurement, misconduct or fault would have to be to be available to aid appellant.

For the errors indicated in appellate instructions the judgment is reversed and the cause remanded.

Reversed and remanded.

the nation and the nation of the future, this
country is still a world power to be available to all
people.

For the future of the world is in our hands.

The future is ours and the world is ours.

Forward and upward.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, do HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

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5818

Whitney 28

186

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice

182 I.A. 568

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

5878

IT IS THE ORDER OF THE COURT

at Chicago, on Thursday, the first day of April, 1918.
The Court is composed of the Honorable Chief Justice and the Honorable
Justices of the Supreme Court of the State of Illinois.
The Court is now in session for the purpose of hearing the appeal
of CHARLES WHITNEY, residing in Chicago, Illinois, from the
judgment of the Circuit Court of Cook County, Illinois, in Case No.
1081 A. 588, entered on the 24th day of March, 1918.
The Court has heard the oral argument of the parties and the
written briefs filed in support of their positions.
The Court is now ready to render its decision.

WHEREFORE, the Court, on the 24 day
of March, 1918, the opinion of the Court was filed in
the office of said Court, in the words and figures

Gen. No. 5818.

Philip Buescher, Pltf. in error.

vs

Error to LaSalle.

Illinois Valley Railway Co.

Deft. in error.

Whitney, P. J.

Plaintiff in error commenced this action to recover for injuries alleged to have been received by reason of the acts of negligence of defendant in error alleged in the declaration. Issue was joined and a trial had which resulted in a verdict for plaintiff in error. A motion for a new trial was granted and the case tried a second time resulting in a verdict and judgment for defendant in error, from which this appeal is prosecuted. The errors assigned are numerous including rulings on evidence and instructions. No argument is presented by plaintiff in error, on the alleged errors in rulings on evidence and such errors are therefore waived.

It is urged with great force that certain instructions given for defendant in error are erroneous and inasmuch as the judgment must be reversed and remanded for a new trial because of erroneous instructions we make no comment on the evidence except such as may be necessary in order to show errors in instructions.

The first count of the declaration charged that upon the approach of the car on which plaintiff in error desired to become a passenger, he beckoned it to stop and in response to his signal as it approached it slackened speed and came almost to a stop, and that became an invitation to him to get upon the same, and that in the exercise of ordinary care he stepped upon the car and defendant in error negligently caused the car to start forward in a violent jerk and

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... 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675,

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3.5. *Summary*

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It is wished with great force that certain instructions

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at his invitation as shown in the photo of it.

... and that in the exercise of ordinary care

He stayed with the car and defendant in error resulting

and that the first of the two sets of

jerked plaintiff in error from the same and he was thrown to the ground and run over and suffered an amputation of a leg. The second count alleges when plaintiff in error was endeavoring to get aboard the car, in the exercise of ordinary care, he was thrown from the same without sufficient time being given him to get aboard owing to the negligence of defendant in error in operating the car. The third count charged the same and that upon a signal of plaintiff in error the speed was slackened and plaintiff in error was thereby invited to get aboard and that he attempted to do so but the car suddenly started forward with accelerated speed before he had an opportunity to get aboard, and the car being violently started he was thrown to the ground. There was therefore one count which charged that plaintiff in error got aboard the car and that he was thereafter thrown therefrom by the jerking of the car.

The evidence was very contradictory on many subjects but there was proof clearly tending to sustain the averment that plaintiff in error had gotten upon the car, and was thrown off by the jerking of the car. Under these circumstances the instructions of defendant in error numbered 18, 19 and 24 were bad.

The 18th. instruction is that if a person of ordinary prudence exercising ordinary care would not have attempted to get upon the car, then they should find defendant in error not guilty. This deprived plaintiff in error of his first cause of action, or might do so even if it was negligence for him to start to get on the car, yet if he had gotten on and had hold with both hands and had his left foot on the lower step and was placing his other foot on the step, as some of the evidence is, and then was jerked by

...in error from the same and he was known
...and run over and suffered an amputation of
...The second count alleges that plaintiff in error
...to get aboard the car, in the exercise of
...care, he was thrown from the same without sustaining
...him being given him to get aboard owing to the negligence
...in error in operating the car. The third count
...and that upon a signal of plaintiff in
...and plaintiff in error was
...to get aboard and that he attempted
...the car suddenly started forward with accelerated
...he had an opportunity to get aboard, and the
...he was thrown to the ground.
...which plaintiff in error was thrown from the car
...that he was thrown from the car and that he was thereafter
...of the car.
...The witness was very much surprised at the result.
...was placed clearly landing in within the movement
...plaintiff in error had gotten upon the car, and was
...by the parking of the car. Under these cir-
...of defendant in error mentioned
...and of same had.
...The 18th. instruction is that if a person of ordinary
...would not have attempted
...that they should find defendant in
...This is a very difficult question of fact
...of which it is not pos-
...to get on the car, yet if he had
...and had held with both hands and had his left
...and was placing his right foot on the
...and then was thrown by

the start of the car by reason of its accelerated speed and that threw him off, and if that act was negligence, then he would not be prevented from recovery because it was negligent to try to get on in the first place.

The same criticism applies to the 19th. The 24th. also says that if he was negligent in attempting to get on he cannot recover, thus ignoring that part of the proof and pleading which charges the company with negligence in starting the car after he had got on. The 24th. instruction is also erroneous in saying that defendant in error was not required to assume that plaintiff in error was going to attempt to board the car while in motion, nor was it required to stop its car lest he might attempt to do so. That might be true under some circumstances, and not under other circumstances.

If, as some of the evidence is, the motorman saw plaintiff in error standing there signalling to get on, the left front vestibule being open and a man having just got off the car a short distance away in sight of plaintiff in error, then if the defendant reduced the speed so low that it amounted to an invitation to get on at the front vestibule then it would not be true that defendant was not required to assume that he would.

The instructions for defendant in error numbered 20, 33, 35 and 36 are each erroneous. They select a single circumstance or point and say that that alone would not entitle plaintiff in error to recover, or that alone would not be negligence, or that it does not matter what the fact is in regard thereto. There might be several circumstances for example. As to each one alone it would be true that it might not be evidence of negligence, and yet proof being made

the fact of the car by reason of the accelerated speed and
the fact that it was negligent, and it is that not was negligent, that
he could not be prevented from recovery because it was neg-
ligent on try to get on in the first place.
The same criticism applies to the 19th. The 21st.
also says that it was negligent in attempting to get on
the ground, however, there is nothing that part of the proof and
negligent which charges the company with negligence in statu-
ing the car after he had got on. The 21st. instruction is
also erroneous in saying that defendant in error was not
negligent in saying that plaintiff in error was going to
attempt to board the car while in motion, nor was it required
to show the car was in motion at the time. The 21st.
is also erroneous in saying that defendant in error was not
negligent in saying that plaintiff in error was going to
attempt to board the car while in motion, nor was it required
to show the car was in motion at the time. The 21st.

It, as one of the evidence is, the motor car
plaintiff in error standing there signalling to get on, the
left front vestibule being open and a man having just got
out the car a short distance away in sight of plaintiff in
error, then it was defendant's duty to stop the car at low speed
to enable plaintiff to get on at the front vesti-
bule. It would not be true that defendant was not ne-
gligent to assume that he would.

The instructions for defendant in error numbered
20, 21, 22 and 23 are each erroneous. They relate a single
circumstance on point and say that that alone would not
establish plaintiff in error's recovery, or that alone would
not be negligence, or that it does not matter what the fact
is or what the facts. There might be several circumstances
for example. As in each one alone it would be true that it
could not be evidence of negligence, and yet prove that it was

to establish each of these several facts, the combination might be proof of negligence.

The principles applicable to these instructions were discussed in *Coburn v Moline, E. Moline & Watertown R. R. Co.* et al 149 Ill. App. 132, and in *Coburn v Moline, E. Moline & Watertown R.R. Co.* et al 243 Ill. 448.

The 35th. instruction was to the effect that it did not matter what the condition of the brake was on the car in question at the time the accident happened, and the 36th. instruction was to the effect that it does not matter how far the car ran after the accident. They are literally true in a sense yet the distance the ~~xx~~ car ran and the condition of the brake might throw light upon the question whether the car was running rapidly when plaintiff in error stepped on, or sought to step on, as the case might be, or whether the car was running slowly and whether so slowly that it amounted to an answer to the signal plaintiff in error had given, and amounted to an invitation to him to get on the car. If for instance the brake was in bad order and if the car stopped within five or ten feet that would strongly tend to show the speed had been very much reduced and would favor the contention of plaintiff in error. If on the other hand the brake was in perfect order and still the car ran several hundred feet before the motor man could stop it, that would strongly tend to show the car was running rapidly when plaintiff in error got on, or attempted to get on and would tend to support the contention of defendant in error.

While these two matters would not be sufficient to predicate a verdict on, either one or both of them, yet they might be material in determining one of the material facts in the case.

Judgment reversed and cause remanded.

While these two matters would not be sufficient to establish a verdict on either one or both of them, yet they are material in determining one of the material facts which are in issue in this case.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

THE UNIVERSITY OF CHICAGO
LIBRARY
540 EAST 57TH STREET
CHICAGO, ILL. 60637
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FAX 773-936-5001
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5743

189

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

1821A.584

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 2742

Theodore H. Decker appellee

vs

Appeal from Lake,

William F. Cochran et al.

appellants.

Garnes, J.

This is a suit in equity to enforce a mechanics' lien.

The bill filed by appellee sets out a written proposal to furnish material and labor specified for a hot water heating plant in the house of appellants, stating price and terms of payment, but not specifying time of beginning or completing the work; and the acceptance of that proposal by appellee with covenants of performance, etc. After issues joined, the cause was referred to the master in chancery to take proofs and report his conclusions of law and fact, which he did recommending a decree for appellee for the balance due on the contract price, \$242.50, and the disallowance of appellee's claim of \$40 for extra labor and material furnished. The Court after hearing on exceptions, entered a decree as recommended in the master's report and appellants, defendants below, bring the case here on appeal.

It is urged that the contract set out in the bill is shown to have been altered, was improperly received in evidence and is no basis for any claim in favor of appellee under his bill, which counts only on the written contract. It appears from the evidence that appellants were, in the summer of 1909, fitting their residence at Lake Bluff for occupancy in winter time; that they had theretofore occupied it as a summer residence. In July they were digging a cellar and making a solid foundation under a part of the house and proposed to protect another part of the house by covering

Jan. 24, 1911

Thomas H. Barker, appellee

vs
Appellant from Lake.

William F. Cochran et al.

Appellants.

Verdict, 7.

This is a suit in equity to enforce a written contract. The bill filed by appellee sets out a written contract for the construction of a house at Lake, stating price and terms of payment, but not specifying time of beginning or completion of the work; and the occurrence of that proposal by appellee with statements of performance, etc. After issues joined, the cause was referred to the master in chancery to take proofs and report his conclusions of law and fact, which he did recommending a decree for appellee for the balance of the contract price, \$248.50, and the disallowance of appellee's claim of \$40 for extra labor and material furnished. The Court after hearing on exceptions, entered a decree as recommended in the master's report and appellee, defendants below, bring this case here on appeal.

It is urged that the contract set out in the bill is shown to have been altered, was improperly received in evidence and is no basis for any claim in favor of appellee. Under this bill, which contains only on the written contract, it appears from the evidence that appellee were, in the summer of 1909, fitting their residence at Lake Hill for occupancy in winter time; that they had therefore occupied it as a summer residence. In July they were digging a cellar and making a solid foundation under a part of the house and proposed to erect another part of the house by covering

lumber sheathing with paper. At this time and when the substantial work was about completed they applied to appellee for an estimate of the cost of a heating apparatus that would sufficiently and properly heat the house in the winter time. The matter was discussed between them on several occasions and on August 30th. a verbal agreement was reached as to the labor and material to be furnished and the price to be paid therefor. At that time appellants asked appellee to reduce his proposition to writing, which he did, and on September 2nd, mailed appellant a partly written and partly printed specification with proposal to furnish the material and do the work for \$485⁰⁰ 50% on delivery of the goods 25% on connection of mains and balance on completion. This proposal, though mailed September 2nd. was dated August 5th. William F. Cochran, who was conducting the negotiation on the part of himself and wife, discovering, he says, that August 5th. fell on a Sunday changed the date to August 2nd and wrote his acceptance on the contract inserting a condition "that the work shall be begun inside of one week from the date of ~~his~~ acceptance and completed before September 30 -09 and sooner if possible." He dated his acceptance August 3rd. and mailed it September 3rd. Appellee had already gotten some of the material on the ground.

Appellee testifies in substance that soon after receiving the acceptance, he and William F. Cochran met and discussed the matter of the acceptance being dated in August instead of September making the condition as to beginning the work impossible and also that he might not be able to comply with the condition as to finishing it, and that the condition in the acceptance was abandoned by the mutual agreement of the parties leaving the written contract as yet

...with regard to the time and when the work
...the cost of a heating apparatus that would
...and properly heat the house in the winter time.
The matter was discussed between them on several occasions
and on August 30th, a verbal agreement was reached as to
the terms and material to be furnished and the price to
be paid therefor. At that time appellant asked appellee
to reduce his proposition to writing, which he did, and
on September 2nd, mailed appellee a partly written and partly
printed specification with proposal to furnish the material
and do the work for \$1250 on delivery of the goods.
...of main and balance on completion.
This proposal, though mailed September 2nd, was dated
August 30th. William T. Gandy, an old friend of
appellant on the part of himself and wife, discovering
on Sept. 2nd, that August 30th, fell on a Sunday, changed the date
to August 2nd and wrote his acceptance on the contract in-
serting a condition "that the work shall be begun within
of one week from the date of his acceptance and completed
within approximately 30-60 and sooner if possible." He dated
his acceptance August 2nd, and mailed it September 2nd.
Appellee had already gotten some of the material on the ground.
Appellee testified in substance that soon after re-
ceived the matter of the acceptance being dated in August
instead of September asking the condition as to beginning
the work immediately and also that he might not be able to
comply with the condition as to finishing it, and that
the condition in the acceptance was abandoned by the mutual
agreement of the parties leaving the matter subject to the

out in the bill and offered in evidence. Appelles proceeded with the job completing it some time in October. Fifty per cent of the contract price was paid and this action was brought to recover the balance. There was conflict of evidence on this question but the court was warranted in finding that the contract was changed and modified after signing by the mutual agreement of the parties and treating it so modified as a written contract in which the action could be maintained.

It is also urged that even waiving this question of admissibility of the contract in evidence, appellee was not entitled to recover, because it is said that the plant did not fulfill the purpose specified in the contract. There is no question under the evidence but it did not fail to heat a part of the house, but it was that part of the house that was not sufficiently protected from cold winds underneath. It was guaranteed in the contract that when "the building is built, furnished and occupied as contemplated" the apparatus would be capable of warming all of the rooms to a temperature of 70 throughout the house when the weather outside is ten below zero. It is testified by appellee that in his negotiations with appellants for installing the plant it was represented by them that they would protect that part of the house with lumber sheeting and paper covering, much more thoroughly than they did, and that the reason why that part of the house was not properly heated was because of defective protection; that the floors of the rooms complained of were single, not double, and that the rooms could not be warmed with double the radiation without better protection underneath. There was conflict of testimony on this question and no such preponderance in

out in the bill and offered in evidence. Appellee proceeded with the testimony as was the case in the first trial. The court at the first trial was held and the action was brought to recover the balance. There was conflict of evidence on this question but the court was warranted in finding that the contract was changed and modified after signing by the mutual agreement of the parties and treating it as modified in a written contract in which the action could be maintained.

It is also urged that even waving this question of admissibility of the contract in evidence, appellee was not entitled to recover, because it is said that the plaintiff did not fulfill the purpose specified in the contract. There is no question under the evidence - but it did not fail to be a part of the house, but it was that part of the house that was not sufficiently protected from cold winds under the roof. It was guaranteed in the contract that when "the building to be built, furnished and equipped as contemplated the building would be capable of warming all of the rooms in a temperature of 70 degrees Fahrenheit." Now the evidence is to the effect that it is testified by appellee that in his negotiations with appellee for installing the plant it was represented by them that they would protect that part of the house with lumber sheathing and paper covering, much more thoroughly than they did, and that the reason why that part of the house was not properly heated was because of defective construction that the floor of the room complained of was slight, but double, and that the room could not be warmed with double the radiation as the other rooms. There was evidence in testimony on this question and no such preponderance in

favor of appellants as would justify this court in disturbing their conclusions of the master, who saw and heard the witnesses and the trial court who passed on the evidence as reported by the master.

Finding no reversible error in the record, the decree of the trial court is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

5755

190

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

✓ Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

182 I.A. 585

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

THE UNIVERSITY OF CHICAGO

On Tuesday, the 28th of May, 1918, the following was received from the University of Chicago:

The University of Chicago has received from the University of Chicago the following:

The University of Chicago has received from the University of Chicago the following:

185, 186, 187

On the 28th of May, 1918, the opinion of the Court was filed in the office of said Court, in the words and figures:

Gen. No. 5755.

O. A. Lundquist, Pltf. in error.

vs

Error to Putnam.

A. P. Child, Deft. in error.

Carnes J.

O. A. Lundquist plaintiff in error, filed his declaration in assumpsit against A. P. Child defendant in error alleging the sale of certain real estate known as "Blacksmith shop now occupied by Bert Fifield" by plaintiff to defendant at public vendue for the sum of \$800. \$200 cash, \$600 at the delivery of the deed, and balance to be agreed upon by the defendant and the plaintiff, the tender and refusal of a deed therefor and consequent damages. A written memorandum is alleged to have been made by the auctioneer as follows:

"O. A. Lundquist sale, August 3, 1912.

Article:

Name:

Blacksmith shop subject to street tax: A. P. Child \$800.00

W. H. Westcott,

C. K. "

A general demurrer was filed and sustained, and plaintiff in error abiding by his admission declaration, judgment was entered against him, and he brings the case here for review.

Advantage may be taken of the Statute of Frauds by general demurrer whenever it appears from the face of the declaration that the agreement sued on is within the statute and fails to comply with the requirements thereof; Cary v Newton 301 Ill. 170; Dichen v McKinley 163 Ill. 310. It was formerly held that the writing required by the statute might in case of auction sales, be by memorandum made by the auctioneer, that the memorandum must be complete on its face

Gen. No. 2700.

O. A. Lundquist, Pet. in error.

vs

A. P. Child, Def. in error.

Case 1.

O. A. Lundquist plaintiff in error, filed his declaration in assumpsit against A. P. Child defendant in error alleging therein that certain real estate known as "Blacksmith Shop" was conveyed by Deft. Child to plaintiff to defendant as joint tenants for the sum of \$800. \$200 each, \$600 at the delivery of the deed, and balance upon terms of the defendant and the plaintiff, the tender and refusal of a deed therefor and consequent damages. A written memorandum is alleged to have been made by the defendant as follows:

"O. A. Lundquist sale, August 2, 1912.

Home:

Blacksmith Shop subject to street tax: A. P. Child \$800.00

W. H. Westcott,

C. K. "

A General demurrer was filed and sustained, and plaintiff in error appealing by his written declaration, judgment was entered against him, and he brings the case here for review.

Advantage may be taken of the Statute of Frauds by general demurrer whenever it appears from the face of the declaration that the agreement was made on or within the statute and fails to comply with the requirements thereof; *City v. Newton* 201 Ill. 170; *Shuman v. McKinley* 188 Ill. 316. It was formerly held that the writing required by the statute might in case of auction sales, be by memorandum made by the auctioneer, that the memorandum must be complete on its face

or in connection with some other writing, but that the auctioneer need have no written authority therefor, *Doty v Wilder* 15 Ill. 407; but this was before the Act of 1869 requiring the authority of an agent for sale of lands to be in writing signed by the party to be charged, and excepting only sales on execution under a decree or order of court. Since that amendment in auction sales other than judicial sales, the authority of the auctioneer making such memorandums should be in writing, *Hartenbower v Uden* 242 Ill. 434. The declaration contains no averment of such authority.

Without considering whether the memorandum above quoted is sufficiently definite to enable the property to be located by parole evidence, which may sometimes be resorted to, to explain latent ambiguities, it is to be observed that the written memorandum plead, shows a sale for cash, while the contract declared on, is one for part deferred payment, therefore even if there was a written memorandum of a contract answering the requirements of the statute, it is not the contract declared on.

The declaration is bad on another ground, the contract declared on is not complete. The time of payment is an essential part of a contract. It is true if no time of payment is fixed the law will supply the omission by assuming payment on delivery or within a reasonable time etc. but here the ~~purchase~~ purchaser was promised some credit as to half of the purchase price, whether with or without interest, does not appear. If the time had been stated, as for instance one month or one year, no interest could have been demanded during the time payment was so suspended; it was therefore material whether the deferred payment of \$400 was to be for one day, one month or one year. The time

3

was left for future agreement, as was also the question of interest and security, it can hardly be presumed that at a public sale it was intended that payment should be deferred without any security.

There was attached to the declaration under the title of "copy of account" a copy of the advertisement of the auction sale, which included the property in question, in which it appears that the terms of the sale were as stated in the declaration. Counsel in argument treat this copy of accounts as part of the declaration; but it is no part thereof and is something which the court in considering a demurrer "cannot see with legal eyes" (*Peckens v Lee* 8 Ill. 193; *Steele-Weddes Co. v Schoodic Pond Pack Co.* 153 Ill. App. 576) But if it be read as part of the declaration it would not change the conclusions here announced.

Finding no error in the record the judgment of the circuit court is affirmed.

in connection with some other writing, but that the same
 document was used by the witness in the case of the
 12-11-1907, but this was before the 1st of 1908 regarding
 the authority of an agent for sale of lands to be in writing
 signed by the party in the contract, and executed only when
 an execution under a decree or order of court. Since that
 amendment in relation sales other than judicial sales, the
 authority of the witness with some other document should
 be as witness, Harkins v. Uden 308 Ill. 434. The doc-
 ument contains no reference to such authority.
 It seems to be a document of the same nature as the
 one is sufficiently definite to enable the property to
 be located by parole evidence, which may sometimes be re-
 sorted to, to explain latent ambiguities, it is to be what
 appears in the written memorandum filed, shows a sale for
 one, while the contract declared on, is one for part de-
 lated payment, therefore even if there was a written
 statement of a contract showing the requirements of the
 statute, it is not the contract declared on.
 The declaration is based on another ground, the con-
 tract declared on is not written. The time of payment is
 an essential part of a contract. It is true at no time of
 payment is fixed the law will supply the omission by assum-
 ing payment on delivery or within a reasonable time etc.
 but here the payment was promised some other time
 to wit: at the time of the sale, which was in 1908.
 Interest, does not appear. If the time had been stated, as
 for instance one month or one year, no interest could
 have been demanded during the time payment was due; and
 it was therefore material whether the delayed payment of
 \$400 was to be for one day, one month or one year. The time

was left for future agreement, as was also the question of interest and security, it can hardly be presumed that at a public sale it was intended that payment should be deferred without any security.

There was attached to the declaration under the title of "copy of account" a copy of the advertisement of the auction sale, which included the property in question, in which it appears that the terms of the sale were as stated in the declaration. Counsel in argument treat this copy of accounts as part of the declaration; but it is no part thereof and is something which the court in considering a demurrer "cannot see with legal eyes" (Pearsons v Lee 2 Ill. 195; Steele-Wedeler Co. v Schoodic Pond Park Co. 153 Ill. App. 576) But if it be read as part of the declaration it would not change the conclusions here announced.

Finding no error in the record the judgment of the circuit court is affirmed.

was left for future agreement, as was also the question of
interest and security, it was decided to proceed with the
negotiations. It was intended that the agreement should be executed
without any security.
There was no objection to the agreement about the time
of "copy of account" a copy of the advertisement of the
auction sale, which included the property in question, in
which it was stated that the terms of the sale were as stated
in the advertisement. There was no objection to the copy of
the advertisement as part of the declaration; but it is no part thereof
and is material which the court in considering a demurrer
must see with legal eyes" (Petterson v Lee 2 Ill. 125;
Petterson v Lee 2 Ill. 125; Petterson v Lee 2 Ill. 125;
1887) but if it be used as part of the declaration it would
not change the declaration from material.

Having no error in the record, the judgment of the
circuit court is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

THE FIRST PART OF THE HISTORY OF THE
CITY OF LONDON, FROM THE FOUNDATION
OF THE CITY, TO THE PRESENT TIME.
BY JOHN STOW.
IN THREE VOLUMES.
THE SECOND PART.
CONTAINING THE HISTORY OF THE
CITY OF LONDON, FROM THE FOUNDATION
OF THE CITY, TO THE PRESENT TIME.
BY JOHN STOW.
IN THREE VOLUMES.
THE THIRD PART.
CONTAINING THE HISTORY OF THE
CITY OF LONDON, FROM THE FOUNDATION
OF THE CITY, TO THE PRESENT TIME.
BY JOHN STOW.
IN THREE VOLUMES.

5776

Carnes, J.

194

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

182 I.A. 608

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

1331.408

RE: HONORABLE, that the above, to wit: on the 24 day
 of 1918, the opinion of the Court was filed in
 the case of the said Court, as before and directed

Gen. No. 5776.

Vera Scott, appellant.

vs

Appeal from Stephenson.

Emma Slocke, et al

appellees.

Carnes, J.

Emma Slocke, appellee filed a bill against Vera Scott appellant, to compel the surrender of a certificate of bank stock, the property of appellee, which had been in the possession of appellant as collateral security for a debt of appellee's husband to appellant, alleging an agreement that said stock should be surrendered. There were other parties to the suit not necessary to be considered in determining the questions here presented. Issues of fact were made up and the cause submitted to the Master who heard the proofs and reported a finding of facts with a recommendation that a decree be entered granting the relief prayed. Objections and exceptions were duly presented and passed upon and a decree was entered by the court in substantial accordance with the Master's finding of facts, ordering appellant to deliver said certificate of stock to appellee and for costs. Appellant brings the case here for review.

We agree with appellant's counsel that the case all depends on the decision of one simple question of fact, and that the burden of proof was on appellee to establish that fact, and that there is no question but that the bank certificate was the property of appellee endorsed by her in blank and used by her husband, with her consent, to secure, in part, his indebtedness to appellee, that the only question is did appellant agree to return this certificate before the

DATE _____

1994-1995, 1996-1997

Approved for Release by NSA on 09-11-2013 pursuant to E.O. 13526

26. *For details see text.*

re-Decon

• C. BARTON

[illegible]

the appellant agrees to return this certificate before the
is not, his indebtedness to appellee, that the only question
and used by her husband, with her consent, to secure,
certificate was the property of appellee endorsed by her in
fact, and that there is no question but that the bank
and that the burden of proof was on appellee to establish
depends on the decision of one simple question of fact,
We agree with appellant's counsel that the case all

indebtedness was paid, or did she not? that on this point the evidence is conflicting, appellee and her husband testifying that she did, and appellant alone testifying that she did not; and that the three witnesses in the absence of corroborating or contradicting circumstances are so far as the record shows, equally credible.

It appears that appellant and appellee are sisters that Frank W. Siecke the husband of appellee, was the executor of the will of their mother, that in closing up the estate in May 1905 he gave appellant his two notes for \$5000 each, collaterally secured by \$9500 par value of so called Vinegar stock and \$500 par value of so called German Bank Stock. The certificate representing the German Bank Stock was owned by appellee, but was used by her husband with her consent as such security, the indebtedness was not paid when due, renewal notes were given, all of said stock still standing as security. While matters were standing in this shape. Frank W. Siecke, desiring to sell the Vinegar stock, had a conversation with appellant in the presence of appellee and a sister ~~and~~ Alma Biersach, in which appellee and her husband testify, it was agreed that all the collateral both the Vinegar stock and the Bank stock should be surrendered, and that one of the notes should be paid in cash and the other extended. Appellant testifies to substantially the same thing, except she says that nothing was said about the Bank stock. Mrs. Biersach the sister, was not called as a witness. The Vinegar stock was returned and disposed of and one note paid. Appellee and her husband say they supposed the Bank stock was also returned; this was in June 1907. In 1909 appellee contracted to sell the Bank stock to one Rawleigh, and failing to find the certificate treated it

...was paid, on the 10th day of this month ...
...is notwithstanding a ... and her husband ...
...that was ... and ...
...and that the three witnesses in the absence of ...
...circumstances are so far ...
...the second shows, specially available.
...It appears that ... and ...
...that ... the husband of ... was the ...
...of the will of their mother, that in closing up the ...
...in May 1908 he gave ... his two notes for \$5000 ...
...colleaguely secured by \$5000 per value of ...
...\$500 per value of ... called ...
...The certificate representing the ... stock ...
...was used by ... but was used by her husband ...
...as such security, the ... was not ...
...remains ... given, all of which ...
...as security, while ... was ...
...Frank W. ... to all the ...
...had a conversation with ... in the presence ...
...at ... in ... in which ...
...it was agreed that all the ...
...the ... stock should be ...
...and that one of the notes should be paid in cash ...
...As ... settled to ...
...the ... was ...
...the ... was not called ...
...The ... was returned and ...
...As ... the husband ...
...this was in June 1907.
...the ... to all the ...
...and failing to find the certificate ...

as lost and procured a duplicate certificate to be issued by the bank to Rawleigh. Afterwards in November 1911, Frank W. Siecke filed a petition in bankruptcy, and in January 1912 appellant filed a claim against the bankrupt estate on the \$5000 note held by her stating that it was secured by this certificate of Bank stock, which she in fact still held. Appellee and her husband say this was the first knowledge or suspicion they had that she retained the Bank stock at the time of the re-arrangement in 1907, and they therefore filed this bill.

The decision of the case depends entirely upon what was said at the meeting in 1907, above referred to. Counsel for appellant strongly urges that a careful inspection of the entire record discloses many reasons for disbelieving appellee and her husband, or at least finding that their combined testimony does not outweigh that of appellant alone. We have carefully considered the evidence and while it is true that there are some things in the history of the case that might lead a court to scrutinize the testimony of appellee's husband with care, and some reason to doubt whether appellee herself was sufficiently informed about business matters to understand and remember distinctly what took place, still if the question was to be determined by us on the face of the record alone, we would not feel warranted in saying that the testimony of appellant was not outweighed by that of the other two witnesses, and much less can we, aided by the report of the Master who saw these witnesses and heard them testify, confirmed by the decree of the trial court, say that the court erred in finding the facts in accordance with the testimony of appellee and her husband and against the testimony of appellant.

Finding no error in the record the decree of the trial court is affirmed.

he does not remember a duplicate certificate as he issued
by the same to Jewell. Afterward in November 1911, when
V. H. Jones filed a petition for bankruptcy, and in January 1912
Jewell filed a claim against the bankrupt estate on the
ground that he had loaned money to the same, which was
a certificate of bank stock, which was in fact still held.
Jewell had not received any title was the first investigation
on examination they had and returned the bank stock
at the time of the re-examination in 1907, and they there-
fore filed this bill.

The decision of the case depends entirely upon what
was said at the meeting in 1907, above referred to. Counsel
for appellant strongly urges that a careful inspection of
the entire record discloses many reasons for doubting
Jewell and her husband, or at least thinking that their
testimony does not outweigh that of a certain
number. We have carefully considered the evidence and while
it is true that there are some things in the history of
the case that might lead a court to doubt the testimony
of Jewell's husband with care, and some reason to doubt
Jewell herself was sufficiently informed about
business matters to understand and to make intelligently what
testimony, still it is the question we to be determined by us
on the face of the record alone, we could not well entertain
any doubt that the testimony of appellant was not suf-
ficiently supported by that of the other two witnesses, and such was
the case, that on the report of the court we are bound
to believe and have them testify, confirmed by the fact
of the trial court, say that the court was in finding the
facts in accordance with the testimony of Jewell and
her husband and against the testimony of Jewell's
husband. no error in the record. the decree of the trial
court is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

5779

195

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

182 I.A. 609

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5779.

Ida Gourley, appellant.

vs

Appeal from Grundy.

Carrie Pierce et al appellee.

Carnes J.

Charles W. Buren dies July 5th. 1910 leaving as his own heirs at law, his sisters Ida Courley and Alice Hourigan, and his nephew Walter Moyer and niece Rose Bonin, children of a deceased sister; whether he left any estate, and if so how much or of what character, the record does not disclose. He left a will executed about one year before his death, in which W. Scott Pierce, Carrie Pierce his wife and Coronne Pierce and Bernice Pierce their two minor children are the only beneficiaries named, and W. Scott Pierce is named as executor. The attempted disposition of property is by a general residuary clause after provision for two legacies of \$500 each. The will was admitted to probate and W. Scott, Pierce qualified as executor. The four heirs filed a bill in chancery June 24, 1911, to the September Term 1911 of the Grundy County Circuit Court, to contest the will, setting up the above facts and charging mental incapacity of the testator and undue influence by the beneficiaries at the time of the making of the will, and making the four beneficiaries defendants. In the bill they asked that a guardian ad litem be appointed for the use of the two minor defendants. There was service on all defendants to the September Term, 1911. At that term H. B. Smith a solicitor entered his appearance for all defendants and filed an answer for the adult defendants, denying the allegations of mental incapacity and undue influence and admitting all other allegations of the bill. During this

Charles F. Smith, Plaintiff,

his heirs at law, his sisters Eda Connelly and Alice Connelly, and his nephews Walter Meyer and niece Rose Meyer, et al., of a deceased sister; whether he left any estate, and if so how much as of that character, the record does not disclose. He left a will executed about one year before his death, in which W. Scott Pierce, George Pierce his wife

and George Pierce and Benjamin Pierce their two minor children are the only beneficiaries named, and W. Scott Pierce is named as executor. The attempted disposition of property is by a general residuary clause after provision for the payment of \$500 each. The will was admitted to probate and W. Scott Pierce qualified as executor. The four heirs killed a bill in January Term 2d, 1911, to the Supreme Court of the County Circuit Court, to revoke the will, setting up the Grove tract and charging certain irregularity of the probate and undue influence by the deceased at the time of the making of the will, and asking the four beneficiaries to be reinstated. The bill was asked that a guardian be appointed for the use of the two minor beneficiaries. There was service on all defendants to the Supreme Court, 1911. At that time H. H. Smith a solicitor entered his appearance for all defendants and filed an answer for the said defendants, denying the allegations of undue influence and undue influence and admitting all other allegations of the bill. During this

term W. Scott Pierce died testate and there was an order of court ~~amending~~ substituting the executor of his will as a party defendant and permitting the answer filed by Pierce to stand as the answer of the executor so substituted. Afterwards, and before the September Term 1912, other parties purporting to be beneficiaries under the will of W. Scott Pierce, entered their appearance in writing. September 10 1912, at the September term of said court, with the pleadings in this condition, no guardian ad litem appointed and no issue formed under the statute for trial by jury, the cause was set for trial "to follow common law number 2807" apparently with the consent of all parties, certainly without objection so far as the record shows. There is nothing in the record to indicate that the Court's attention was called to the condition of the pleadings, or that complainants had suggested, other than in their bill, that a guardian ad litem be appointed, or that anyone suggested that an issue be made up at any time before, or at the time when, the case was set for trial, though the record shows complainants' solicitor was present at that time.

On September 23rd. 1912, which we may presume was the time when the case was reached for trial in accordance with the order of the 19th. setting it for trial, it appears from the certificate of evidence as abstracted, that the solicitor of record for complainants "Mr. Huston explained to the court that he could not proceed with the case and he could take no part in the trial of the case; that Mr. Shay was the leading attorney in the case but was unable to be present at that time." No action of the court is shown on this suggestion, no continuance or postponement was requested for that reason but the case proceeded to trial

San. M. 2005.

Mr. Conroy, defendant.

A report from Conroy.

Justice Pierce at all times.

Page 3.

Charles W. Homan dies July 25th, 1910 leaving as his only heirs at law, his sisters Ida Conroy and Alice Conroy, and his nephew Walter Hoyer and niece Rose Homan, children of a deceased sister; whether he left any estate, and if so how much or of what character, the record does not disclose. He left a will executed about one year before his death, in which W. Scott Pierce, Justice Pierce his wife and Justice Pierce and Justice Pierce their two minor children are the only beneficiaries named, and W. Scott Pierce is named as executor. The attempted disposition of property is by a general residuary clause after provision for the payment of \$500 each. The will was admitted to probate and W. Scott Pierce qualified as executor. The four heirs filed a will as executory June 24, 1911, to the Registrar of the County Court of Lincoln County, Nebraska, to execute the will, setting up the above facts and charging certain irregularities of the testator and undue influence by the beneficiaries at the time of the making of the will, and asking for four beneficiaries defendants. In the bill they asked that a partition be ordered for the use of the two minor defendants. There was service on all defendants to the Registrar June 24, 1911. At that time H. M. Smith a solicitor entered his appearance for all defendants and filed an answer for the adult defendants, denying the allegations of mental incapacity and undue influence and admitting all other allegations of the bill. During this

term W. Scott Pierce died testate and there was an order of court ~~amending~~ substituting the executor of his will as a party defendant and permitting the answer filed by Pierce to stand as the answer of the executor so substituted. Afterwards, and before the September Term 1912, other parties purporting to be beneficiaries under the will of W. Scott Pierce, entered their appearance in writing. September 19 1912, at the September term of said court, with the pleadings in this condition, no guardian ad litem appointed and no issue formed under the statute for trial by jury, the cause was set for trial "to follow common law number 2307" apparently with the consent of all parties, certainly without objection so far as the record shows. There is nothing in the record to indicate that the Court's attention was called to the condition of the pleadings, or that complainants had suggested, other than in their bill, that a guardian ad litem be appointed, or that anyone suggested that an issue be made up at any time before, or at the time when, the case was set for trial, though the record shows complainants' solicitor was present at that time.

On September 23rd. 1912, which we may presume was the time when the case was reached for trial in accordance with the order of the 19th. setting it for trial, it appears from the certificate of evidence as abstracted, that the solicitor of record for complainants "Mr. Huston explained to the court that he could not proceed with the case and he could take no part in the trial of the case; that Mr. Shay was the leading attorney in the case but was unable to be present at that time." No action of the court is shown on this suggestion, no continuance or postponement was requested for that reason but the case proceeded to trial

... W. Scott Pitzer died testate and there was an order
of court appointing administrators the executor of his will
as a party defendant and permitting the answer filed by
Pitzer to stand as the answer of the executor as substituted.
Accordingly, and before the September Term 1912, other parties
participating to be benefited under the will of W. Scott
Pitzer, moved their appearance in said case. Defendant is
1912, at the September term of said court, with the
pleadings in this condition, no question as to the propriety
and no issue formed under the statute for trial, but
there was not for trial "to follow common law number 2007"
conformity with the consent of all parties, certainly without
objection as far as the record shows. There is nothing in
the record to indicate that the Court's action was called
to the attention of the pleaders, or that consideration
had suggested, other than in their bill, that a question
of law be proposed, or that anyone suggested that an issue
be made up at any time before, or at the time when the case
was set for trial, except the record shows otherwise.
Defendant was present at that time.
On September 24th, 1912, which was my presence was
the time when the case was removed for trial in accordance
with the order of the 12th, setting it for trial, it
appears from the certification of evidence as submitted, that
the action of record for complaint "W. Pitzer" explained
to the court that he could not proceed with the case and
he would take no part in the trial of the case; that he,
they was the leading attorney in the case but was unable to
be present at that time." The action of the court is shown
on this subject, no settlement or postponement was
proposed for that reason but the case proceeded to trial

with no further objection; two witnesses testified on the part of the proponents of the will; it does not appear who examined them, or whether counsel for complainant took any part in their examination, but at the close of the proof the abstract shows "The court instructed the jury to find in favor of the defendants. To which action of the court the complainants by their counsel then and there duly excepted." The jury returned a verdict in accordance with the instruction of the court and a decree was entered accordingly. It is complained that the court instructed the jury orally but the abstract does not furnish any information on that point further than above quoted, and we must assume the instruction was given in proper form and manner.

At some time on September 23rd, the day of the jury trial, appellant filed a petition for a change of venue charging prejudice of the trial judge against her, the other complainants neither joined in nor consented to the application. Also on the same day all complainants filed a petition that the cause be discontinued as to the three complainants, other than Ida Courley, and that said three complainants be made defendants. Appellant also filed a statement that she had been appointed by the county court of Grundy County administratrix de bonis non with will annexed of the estate of the testator and a request that she be substituted, as such, as defendant in the place of Pierce, the deceased representative, and that the cause be continued that summons might issue and be served on herself. She also asked leave to withdraw her petition for change of venue. These four motions were each denied by the court; in what order they were presented and acted upon we cannot determine from the abstract, and the record is about equally confusing. In one part of the record they are recited to have been filed

and acted upon after the verdict of the jury. If appellant desires to avail herself of any error of the court in acting upon any of these motions, it is her duty to so abstract the record that such erroneous action of the court is shown; not having done so we cannot say that the court erred in passing upon any of them. We cannot see that appellant can complain that the court refused to continue her case to enable her to make herself defendant and get service on herself; or that she is injured by the action of the court in holding her three co-complainants in court as complainants, instead of discontinuing as to them and continuing the case for service on them as defendants. The application for change of venue was properly denied because not joined in or consented to by the three co-complainants, if for no other reason, and if as the record indicates, the ruling of the court denying the application for a change of venue followed his ruling denying appellant leave to withdraw the application, she was not harmed, as the result of denying both motions was the same as would have been the result of allowing the motion to withdraw her petition.

The remaining questions are whether there was any error of which appellant can complain in proceeding to a decree without the appointment of a guardian ad litem and without an issue at law made up as provided in Section Seven of our Act in Regard to Wills, which provides in case of contest of a will by bill in chancery that "An issue at law shall be made up whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the circuit court of the county wherein such will, testament or codicil shall have been proven and recorded as aforesaid, according to the practice in courts of chan-

was asked upon what the verdict of the jury. It appeared
that she was asked to swear herself of any error of the court in
calling upon any of these witnesses, it is not only to be
asked the record that such erroneous action of the court
is shown not having done so we cannot say that the court
was in passing upon any of them. We cannot see that any-
one can complain that the court refused to continue her
case to enable her to make herself defendant and not ap-
pear on herself; or that she is injured by the action of
the court in holding her three co-defendants in court as
defendants, instead of discharging her from them and
continuing the case for service on them as defendants.
The application for change of venue was properly denied
because not joined in or represented by the three co-
defendants, it is for no other reason, and it is the record
indicates, the ruling of the court denying the application
for a change of venue followed his ruling denying appellant
leave to withdraw the application, she was not harmed, as the
result of denying both motions was the same as would have
been the result of allowing the motion to withdraw her
petition.

The remaining questions are whether there was any
error of which appellant can complain in proceeding to a
verdict without the assignment of a guardian ad litem and
without an issue as law made up as provided in Section Seven
of our Act in regard to wills, which provides in case of non-
test of a will by will in substance that "An issue of law
shall be made up before the writing produced be the will
of the testator or not, which shall be tried
by a jury in the district court of the county wherein such
will, testament or official shall have been proven and recorded
as directed, according to the practice in such cases."

easy in similar cases."

On the first point it is to be remembered that the minor defendants are not complaining of the action of the court, and that nothing done or omitted by the court resulted in an injury to them; they were not heirs of the testator and had nothing to gain by any decree of the court other than one dismissing the bill. The question is whether appellant, who was seeking to deprive these minor defendants of all interest in the property and whose duty it was to see that all parties interested were in court and in position to be bound by any decree in her favor, and who had by counsel been present when the case was set for trial, without objecting that no guardian ad litem was appointed and without suggesting that fact to the court, and had been represented at the trial and taken part therein without any such suggestion, can now for the first time in this court, avail herself of any error of the trial court in that respect. We are of the opinion that she cannot, in the absence of anything appearing of record showing any injury to her interest from such failure to appoint a guardian ad litem. *Gage v Schroder*, 73 Ill. 44, and authorities there cited; *Ency. of Pleading and Practice* Vol. 10 Page 634. It is said in the text of 22 CYC 644, "Adult parties cannot invoke the infancy of another party not represented by guardian ad litem to set aside the decree as to themselves"; and whatever limitations there may be to that rule, we see no reason why it should not be applied to this case under the record here presented, showing a hearing of the case participated in by appellant, in which there was no evidence whatever introduced in support of her bill. Appellant cannot complain of error not affecting her.

any in similar cases." On the first point it is to be remembered that the other defendants are not obtaining of the action of the court, and that nothing done or omitted by the court is held to be an injury to them; they were not aware of the matter and had nothing to do with it. The question is whether they had an opportunity to be heard. The question is whether they were seeking to deprive those whom they were to see of all interest in the property and whose duty it was to see that all parties interested were in court and in position to be heard by any device in her power, and who had by her been present when the case was set for trial, with- out objecting that no guardian ad litem was appointed and that a guardian had been appointed to the court, and had been appointed at the trial and taken part therein without any suggestion, and now for the first time in this case, a self-interest of any error of the trial court in not appointing. We are of the opinion that she cannot, in the absence of anything appearing of record showing any duty to her interest from such failure to appoint a guardian ad litem. Gage v. Schroeder, 73 Ill. 44, and the cases there cited; They, of Evidence and Practice, 2d, 10, page 234. It is said in the text of 22 Cyc 644, "parties cannot involve the infancy of another party or personably guardian ad litem to set aside the decree as to themselves; and whatever limitations there may be in that rule, we see no reason why it should not be applied to this case under the record here presented, showing that of the case participated in by appellant, in which there was no evidence whatever introduced in support of her claim. Appellant cannot complain of error not affecting her."

Pyle v Pyle 158 Ill. 389. Appellant only cited two Appellate Court cases as authority for a contrary view and those cases go no further than to hold that in case of injury to a minor defendant, resulting from a failure on the part of the court to protect his interests by appointment of a guardian ad litem, the infant may have relief. It may be that even in cases where the infant is not complaining, that the court in its tender consideration of the rights of infants might grant relief in cases where the decree was adverse to the infant's interests and he had not been represented in the trial, but the record here does not present that kind of a case.

As to the other question - The record shows a trial participated in by appellant with no suggestion of any lack of proper issue. There was an answer on file that presented issues of fact to be tried, and while under the statute and authorities cited by appellant it is no doubt true that such an issue should have been made up, and it would have been error of which appellant could complain, had the court on suggestion from her refused to present such an issue, no authority is cited supporting or tending to support appellant's contention that she can in this court for the first time urge the error of the trial court in that respect.

The burden of appellants brief and argument is that the trial court erred in forcing the case to trial in the absence of Mr. Shay who was to act as leading counsel in the trial, but there is nothing in the record to support that claim. The solicitor of record for complainant was present at the trial and is not shown to have ~~xxx~~ even requested that it be postponed; the record discloses no

connection of Mr. Shay with the case prior to the day when it was called for trial, and given nothing but the mere suggestion of counsel above quoted. If the court had been requested to postpone the trial, we assume he would have heard the parties on that question and taken such action as might seem just and equitable on the showing made.

Finding no reversible error in the record the decree of the trial court is affirmed.

...with the case prior to the day
it was called for trial, and then nothing but the mere
suggestion of counsel above quoted. If the court had
been requested to postpone the trial, we assume he would
have heard the parties on their position and then made a
decision as to what was just and equitable on the showing made.
...we reversibly error in the record the record
of the trial court is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

1. The first part of the paper is devoted to the study of the
 properties of the function $f(x)$ defined by the equation

$$f(x) = \sum_{n=0}^{\infty} \frac{a_n}{n!} x^n$$
 where a_n are the coefficients of the power series. It is shown that
 the function $f(x)$ is analytic in the whole plane and that it
 satisfies the differential equation

5793

Carnes J.

196

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

182 I.A. 611

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

THE UNIVERSITY OF CHICAGO

1921.611

THE UNIVERSITY OF CHICAGO
LIBRARY
1921.611

Gen. No. 5793.

Gustav Basaleon, appellee

vs

Appeal from Co. Ct. Peoria.

M. M. Baker & Co.

Carnes, J.

Appellee Gustav Basaleon, commenced this action of assumpsit against appellant M. M. Baker & Co., a corporation filing a declaration with two counts, in the first of which he set up a warranty of an automobile, purchased by him of appellant, and a breach of that warranty; the second seems to be an attempt to charge deceit and fraud by appellant in the sale of an automobile to appellee and consequent damage therefrom. Appellant filed the general issue, with an affidavit, stating as the only ground of defense, that appellant had no connection with the sale of the automobile in question. There was a trial with a jury, whose attention was directed by the instructions of the court, to which instructions there is no error assigned, principally to the question whether appellant or the Superior Motor Sales Co. another corporation, sold the automobile in question. There was a verdict and judgment of \$400 for appellee, and appellant brings the case here for review. There is conflict of evidence as to whether or not the machine was defective, but the main question argued is, whether it was purchased of appellant or of the other corporation.

It appears that in June 1911 appellant was engaged in selling farm machinery and automobiles at a store located on Harrison Street in Peoria Illinois. Superior Motor Sales Co. was selling automobiles in a store on Main Street, in the same city, until August of that year when it went out of business. M. M. Baker was the president and actively engaged in the business of each corporation. Appellee was a

Report from the

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2. 1992

of business, M. K. Bailey was the president and actively in the same city, until August of that year when it went out of business. Bailey was selling automobiles in a store on Main Street, in Harrison Street in Illinois. George W. Bailey was in selling cars mainly and automobiles as a sales agent in Illinois. It appears that in June 1911 appellant was employed as a salesman on or for the corporation.

Greek engaged in the candy business in that city, he understood the English Language imperfectly and could not read or understand a written document of much length. He met M. M. Baker at the store on Main Street June 27, 1911, and after some discussion about the purchase of an automobile, Baker filled out one of M. M. Baker & Co.'s printed blank orders for a four cylinder Franklin Automobile, price \$500 and handed it to appellee, there was inserted in the order a warranty that the machine was well made and if maintained in good working order would perform well the purposes for which it was intended, but no list of equipments. Appellee took this order to his attorney who suggested that the words "full speed" be inserted, which was done, and the order taken back ~~in~~ by appellee to the Main Street store June 30, 1911 Baker then or at some prior time inserted in the order "to be equipped as per memo 6-30 attached" and signed the order "accepted by M. M. Baker & Co., at Peoria, Ill. M. M. Baker." the order still remained in appellee's possession but was not signed by him. There was some further negotiation principally with Anthony, a clerk for Superior Motor Sales Co., M. M. Baker was present a part or all of the time. Anthony filled out under the date 6 - 30, an order on the Superior Motor Sales Co., on one of its forms for the same description of Automobile, same price \$500 in which was inserted the words "second hand" and a list of equipments, and no warranty, and told appellee to sign it, which he did after some demur. The words "second hand" were not in the first order but there is no doubt that a second hand automobile was contemplated in drafting each order, as it appears that a new machine of that description would have been much higher priced. Appellee received a second hand machine

...in the early business in that city, he under-
stood the English language imperfectly and could not read
or understand a written document in that language. On May 2, 1911,
he was on Main Street near 27, 1911, and after
some discussion about the purchase of an automobile, Baker
filled out one of M. M. Baker & Co.'s printed blank orders
for a 1911 cylinder Franklin Automobile, price \$200 and
ordered it to be supplied, there was inserted in the order a
statement that the machine was well made and it remained
in good working order would perform well the purpose for
which it was intended, but no list of appliances, appliances
such as a spare tire, etc., was mentioned and the order taken
"all good" to insert, which was done, and the order taken
back by Baker to the Main Street store June 20, 1911.
After that on or about that time inserted in the order the
statement as per page 3-30 attached and signed the order
transmitted by M. M. Baker & Co., at Peoria, Ill., M. M. Baker.
The order still remained in Baker's possession but was
not signed by him. There was some further discussion with
Anthony with Anthony, a clerk for Superior Motor Sales Co.,
M. M. Baker was present a part or all of the time. Anthony
filled out under the date 6-30, an order on the Superior
Motor Sales Co., on one of its forms for the same descrip-
tion of Automobile, same price \$200 in which was inserted
the words "second hand" and a list of appliances, and
transmitted, and told Anthony to sign it, which he did after
some talk. The words "second hand" were not in the first
order but there is no doubt that a second hand automobile
was contemplated in buying each order, as it appears that
a new machine of that description would have been much
higher priced. Baker received a second hand machine

answering the description contained in each order. There is a sharp conflict of evidence as to what took place during the negotiations; appellant's theory being that Baker used the first order as a mere memoranda indicating price, etc. at which a machine would be sold to appellee by Superior Motor Sales Co. and that it was never delivered to appellee as a contract or part of a contract, but that it was intended merely as a guide to the clerk Anthony, in making a contract, and was so ~~mutim~~ used and understood by all parties concerned. Appellee's theory is that the second order was not made or intended as an independent contract but simply as a list of equipments to go with the machine and that he was told by Anthony it was the paper referred to as "memo G-30 attached" and that he could not read or understand English well enough to know to the contrary. Each party introduced evidence in support of his version of the case and the jury were left to determine the matter on a state of evidence so nearly balanced that he would not be justified in disturbing their finding.

Appellee made payments as follows: July 1st. 1911 check drawn to the order of M. M. Baker & Co. \$100.00; August 4th. 1911, check drawn to the order of M. M. Baker, \$150.00; August 22nd. 1911 check drawn to the order of M. M. Baker \$50.00; these checks were each handed to Anthony the clerk, who received them without comment and endorsed payment for the respective amounts on appellee's copy of the second order writing under the credit "Superior Motor Sales Co. by Anthony." There was much trouble with the car and it was frequently repaired by M. M. Baker & Co. and was finally returned to and received by them in the summer of 1912, before this action was brought and several months after Superior Motor Sales Co. quit business in Peoria. There was evidence tending

The following is a description of the document, which is a copy of a letter from the Secretary of the Treasury to the Secretary of the War Department, dated July 1, 1861. The letter is addressed to the Secretary of the War Department, and is signed by the Secretary of the Treasury. The letter is a copy of a letter from the Secretary of the Treasury to the Secretary of the War Department, dated July 1, 1861. The letter is addressed to the Secretary of the War Department, and is signed by the Secretary of the Treasury. The letter is a copy of a letter from the Secretary of the Treasury to the Secretary of the War Department, dated July 1, 1861. The letter is addressed to the Secretary of the War Department, and is signed by the Secretary of the Treasury.

to show that the car was defective and not as warranted, and evidence tending to show that it was not defective, but that the trouble was from inexperience of the operator. A fair question for the jury was presented and their verdict supported by the judgment of the trial court conclusively answers it. They were justified in finding from the evidence that appellee in good faith believed he was purchasing the automobile from appellant, that his contract was fully stated, except as to equipments, in the first order which he submitted to his attorney, and that the second order had no significance except as a memo of equipments referred to in the first order. We do not regard the fact that the first order was not signed by him of much significance; it was signed by appellant and delivered to and kept by appellee and ~~might~~ he might well have understood that the two papers were each a part of the same contract and would naturally have signed his name when requested.

There can be no question but when a contract makes another contract or writing a part of it, the two are to be construed together. (Home Ins. Co. v Favorite 46 Ill. 335) It is also familiar law that two instruments may be executed as a part of the same transaction and agreement and must be read and construed as one instrument (Chicago Tr. & Sav Bank v Trust Co. 190 Ill. 404)

Complaint is made that the court admitted evidence of moneys expended by appellee for repairs of the machine. There was nothing in evidence so admitted that would have influenced the verdict of the jury on the principal question ~~submitted~~ contested. The verdict was for the exact amount that had been paid by appellee on the purchase price of the machine, and the machine having been returned to appellant before suit brought, appellee was at least en-

...that the man was detained and not as mentioned, and
...to show that it was not satisfied, but
...the trouble was from irregularities of the company.
...a copy of the bill was presented and this was
...by the judgment of the trial court concerning
...They were justified in thinking from the
...in good faith believed he was not
...the evidence from the company. That his conduct
...was truly stated, known as an employee, in the first order
...to his attorney, and that the company
...as a matter of course, and as a matter of course
...to the first order. He did not regard the fact
...not the first order was not signed by him at least sign-
...it was signed by a person he believed to be
...and might have signed his name, and might have
...and would naturally have signed his name, and might have
...that was in question, but even a contract was
...on writing a part of it, the two are to be
...Honey Inc. Co. v. Beecham Co. 111, 112
...two hundred and two hundred and two hundred and two
...in a part of the same transaction and agreement, and must
...be used and contained in the same transaction (Chicago Tr. & N.
...Honey v. Beecham Co., 111, 112, 113)
...Company is not that the same admission, and must
...it might be possible for the company to be admitted,
...There was nothing in evidence as admitted that would have
...intended the verdict of the jury on the material question
...The verdict was for the same company
...and not been paid by the company on the same basis as
...the company, and the company is not to be
...believe and might have signed his name, and might have

titled to a verdict and judgment for the amount he had paid appellant.

Finding no reversible error in the record the judgment is affirmed.

1

1. The first step is to identify the problem or goal. This involves understanding the current situation and what you want to achieve.

• *Hermitia* 42-100000

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

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182A 612

5801

197

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER C. DUFFY, Clerk.

1821A. 612

J. G. MISCHKE, Sheriff.

R H Lennell
Oct 9 1913

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5801.

The People of the State of Illinois.

Appellee.

vs

Appeal from Co. Ct. Lake

Edgar Slaughter, Appellant.

Garnes, J.

Appellant, Edgar Slaughter, was at a trial in the County Court of Lake County in October 1911, adjudged guilty of bastardy on a complaint made by Rebecca Carpenter in November 1911. The child was born May 21st. 1911. Counsel in their arguments assume the usual period of gestation, nine months, therefore it must have been begotten in August 1911. Appellant and the prosecutrix are both colored and are from twenty to twenty five years of age. Only five witnesses testified in the case. The prosecutrix swore that appellant was the father of the child and that he visited her and was alone with her frequently during the month of August 1911, and before and after that time. Her evidence as to such visits was corroborated by that of a colored woman a cook for whom she worked at that time as a waitress at the Bachelors' Mess in the officers quarters at Fort Sheridan. Appellant testified that he never had intercourse with the prosecutrix, that he visited her at different times before July 1911, and never saw her after the middle of July of that year, except on the street with some other woman. His testimony as to when he ceased visiting the prosecutrix was slightly corroborated by that of his sister. This sister and another witness swore the reputation of the prosecutrix for truth and veracity was bad, the cook testified it was good, This is the substance of all the evidence and it is manifest the verdict of the jury should not be disturbed

Jan. 18, 1911.

The People of the State of Illinois.

Appellee.

Appeal from Co. 05, Lake

vs

Appellant.

State of Illinois.

County 5.

Appellant, Edgar Klingbecker, was at a trial in the County Court of Lake County in October 1910, at which time he testified on a complaint made by Rebecca Cunningham in December 1911. The child was born May 21st, 1912. Cunningham in her arguments assumes the usual period of gestation, nine months, therefore it must have been begotten in August 1911. Appellant and the prosecutrix are both colored and are from twenty to twenty five years of age. Only five witnesses testified in the case. The prosecutrix swore that appellant was the father of the child and that he visited her and was alone with her frequently during the month of August 1911, one before and after that time. Her evidence as to much visits was corroborated by that of a colored woman named for whom she worked at that time as a waitress at the "Lafayette" House in the Illinois quarters at Fort Sheridan. Appellant testified that he never had intercourse with the prosecutrix, that he visited her at different times before July 1911, and never saw her after the middle of July of that year, except on the street with some other woman. His testimony as to when he ceased visiting the prosecutrix was slightly corroborated by that of his sister. This sister and another witness swore the reputation of the prosecutrix for truth and veracity was bad. The court testified it was good. This is the substance of all the evidence and it is submitted the verdict of the jury should not be disturbed.

unless there is shown some material error of law.

Appellant moved at the close of the People's evidence and again at the close of all the evidence for a directed verdict and assigns error on the action of the court in denying each of those motions, and argues that the court erred in denying the first motion because, as he says, the People's case was made, if at all, by evidence introduced against his object in rebuttal, which should have been introduced in chief. We are of the opinion that the People had made a case when they closed their evidence in chief, and even if that be not so, appellant waived any error in refusing his first motion to direct a verdict, by proceeding with the trial and introducing his defense on the merits. There was certainly no error in refusing his second motion to direct a verdict. He argues that the court erred in admitting testimony in rebuttal that was a part of their case in chief. There was some evidence heard in rebuttal that might better have been introduced in the first instance, but we do not see that appellant was injured by this order of proof or that the trial court abused his discretion in permitting the evidence to be then introduced.

Complaint is made that the court sustained objections to various questions asked of the prosecuting witness on cross examination; the court did sustain objections to questions as to whether or not the prosecutrix had taken a trip to Washington, how many ate at the table at which she was a waitress, how many soldiers were quartered at the barracks and whether or not there was anybody else slept in there besides her, who furnished her money to buy her clothes in the year 1911, and her manner of dress, while it is true that the court might in the exercise of its discretion, have permitted more latitude in the cross examination

whereas there is shown some material error of law.
The court must at the close of the evidence
and again at the close of all the evidence for a directed
verdict and assign error on the action of the court in
denying each of those motions, and argues that the court
erred in denying the first motion because, as he says, the
People, once was made, it is all, by evidence introduced
against his object on the rebuttal, which should have been
sustained in chief. We are of the opinion that the People
had made a case when they closed their evidence in chief,
and even if that be not so, appellant waived any error in
relating his first motion to direct a verdict, by pro-
ceeding with the trial and introducing his defense on the
rebuttal. There was certainly no error in refusing his second
motion to direct a verdict. He argues that the court erred
in admitting testimony in rebuttal that was a part of their
case in chief. There was some evidence heard in rebuttal,
and it is better have been introduced in the first instance,
but we do not see that appellant was injured by this order of
proof, on that the trial court abused his discretion in
admitting the evidence to be then introduced.
Complaint is made that the court sustained objections
to certain questions asked of the prosecu-
tor's examination; the court did sustain objections to
questions as to whether or not the prosecu-
tor's examination, how many are at the table at which the
was a witness, how many witnesses were present at the
hearsay and whether or not there was anybody else along in
there besides her, who furnished her money to buy her
clothes in the year 1911, and her manner of dress, while
it is true that the court might in the exercise of its dis-
cretion, have permitted more latitude in the cross examination

we cannot say that he erred in sustaining objections to these questions. The general character of the prosecutrix for chastity and her conduct with other men was not involved in the issues tried, (*Holcomb v People* 70 Ill. 400; *Scharf v People*, 34 Ill. App. 400) and no evidence was competent ^{on} ~~in~~ those questions unless it showed, or tended to show, that the child was begotten by some other man, and for that purpose it was properly confined to the period on or about the month of August 1911, and most if not all of these questions were not so confined. It is also objected that the court erred in sustaining objections to questions as to what the prosecutrix testified to in the court below. We find no material error in that respect.

It is also argued that the Court erred in refusing and modifying certain instructions offered by appellant. We find nothing in that respect to warrant the reversal of the case and nothing that in our opinion prejudiced the rights of appellant on the trial.

Finding no reversible error in the record the judgment is affirmed.

as stated by him he was in maintaining objections to
these questions. The general character of the prosecu-
tor's questions and the answers thereto were not in-
voluntarily in the issues tried, (Holcomb v People 70 Ill. 400;
People v Taylor, 35 Ill. App. 400) and no evidence was
introduced in those questions which is shown to be
relevant. That the child was forgotten by some other man, and
for that purpose it was properly confined to the period
of or about the birth of August 1891, and most if not all
of these questions were not so confined. It is also objected
that the court erred in maintaining objections to questions
as to what the prosecu-
tor testified to in the court below.
It is also argued that the court erred in refusing
to grant certain instructions offered by appellant. We
find nothing in that request to warrant the reversal of the
verdict and nothing that in our opinion prejudiced the rights
of appellant on the trial.
There is no reversible error in the record in this
case is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this second day
of August, in the year of our Lord one thousand nine hun-
dred and thirteen.

Clerk of the Appellate Court.

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Dibell

204

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in
the year of our Lord one thousand nine hundred and thirteen,
within and for the Second District of the State of Illinois:

Present--The Hon. CHARLES WHITNEY, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. DUANE J. CARNES, Justice.

CHRISTOPHER G. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

182 I.A. 659

BE IT REMEMBERED, that afterwards, to-wit: on the 2d day
of August, A. D. 1913, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

AT A HEARING OF THE ATTORNEY GENERAL,

THE COURT OF THE ATTORNEY GENERAL, IN THE
CITY OF NEW YORK, ON THE 10TH DAY OF
JANUARY, 1901, AT THE OFFICE OF THE
ATTORNEY GENERAL, IN THE CITY OF NEW YORK:

PRESENT:

1881 A 77

IT REMEMBERED, that, inasmuch as, in the
case of A. D. Smith, the position of the Court is
that the office of said Court, in the words and figures

Gen. No. 5781

Henry A. Pope, Exor. &c. appellant.

vs

Appeal from Lake.

W. Irving Osborne, et al appellees.

Dibell, J.

Appellees as receivers, operate a double track interurban railway between Milwaukee and Chicago. The west is the south bound track. On August 13, 1910, a south bound passenger car, operated over said railway by appellees, struck Mrs. Ethel P. West and inflicted injuries from which she died the next day. She left a minor son. The administrator of her estate brought this action to recover damages for the loss caused to the next of kin by her death. The declarations and additions thereto contained 25 counts, of which it is sufficient to say that it was alleged that the servants in charge of the car wilfully and wantonly struck Mrs. West, and that in various ways the receivers are responsible for her death. There was a plea of not guilty and a jury trial. At the close of appellant's evidence the court instructed the jury to find the defendants not guilty. That verdict was returned, a motion for a new trial was denied, and there was a judgment against plaintiff below personally for costs with execution, from which plaintiff below prosecutes this appeal. The judgment should have been against appellant in his capacity as executor, to be paid in due course of administration, but the point is not raised here and the error is waived.

Mrs. West and another woman were walking south upon the south bound track, outside of any public highway, and they were trespassers. The rules of law governing the liability of appellees under such circumstances are variously

THE COURT

IN THE COURT OF THE COMMON PLEAS

FOR THE COUNTY OF MICHIGAN

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stated and applied in the following cases; L. S. & M. S. Ry. Co. v Bodemer, 139 Ill. 596; East St. Louis Ry. Co. v O'Hara, 150 Ill. 580; Peirce v Walters, 164 Ill. 360; I. C. R. R. Co. v O'Connor, 189 Ill. 559; Martin v C. & N. W. Ry Co. 194 Ill. 138; Chicago Terminal R. R. Co. v Kotoski 199 Ill. 583; Chicago Terminal R. R. Co. v Grues, 200 Ill. 195; I. C. R. R. Co. v Eicher 202 Ill. 556; I. C. R. R. Co. v Leiner, 202 Ill. 624; P. U. C. & St. L. Ry. Co. v Kinnare 203 Ill. 388; Bartlett v Wabash R. R. Co. 220 Ill. 163.

The general result of these authorities is that those running a railroad train owe no duty to a trespasser to look out for him and discover his presence in a place of danger, and when he is discovered in a perilous situation the person running the train owes him no duty except to ~~abstain~~ abstain from wantonly and recklessly injuring him, and is bound only to use reasonable care to avoid injuring him after he is discovered to be in a perilous situation. The engineer is not required to stop as soon as he sees a trespasser on the track, but, in the absence of anything to warn him to the contrary, may assume that he will act as a reasonably prudent man and leave the track to avoid being run over.

Appellant called Albert T. Sprague, the motorman who was running this car at the time in question. He testified that he was running it at a speed of 40 to 45 miles per hour and that at that speed he could stop the car in about 600 feet by the use of the emergency brake; that he saw these women walking south upon the track on which he was running when he was 1,000 feet from them and he thereupon blew the whistle and kept on blowing it and also rang the gong and that he kept on the same speed till he

...and applied in the following cases; U. S. & M. E.
Co. v. Robinson, 130 Ill. 580; East St. Louis Ry. Co. v.
O'Brien, 130 Ill. 580; Peirce v. Walters, 130 Ill. 580; I. C.
Ry. Co. v. O'Connor, 130 Ill. 580; Martin v. C. & N. W. Ry.
Co., 130 Ill. 580; Chicago Terminal R. Co. v. Kotowski,
130 Ill. 580; Chicago Terminal R. Co. v. Green, 130 Ill.
130; I. C. R. Co. v. Kitcher, 130 Ill. 580; K. C. R. Co.
v. Kitcher, 130 Ill. 580; P. W. G. & W. D. Ry. Co. v. Kitcher,
130 Ill. 580; Barlett v. Whelan R. Co., 130 Ill. 130.
The court's review of these authorities is that there runs
through them a common thread, namely, that a railroad train
has a duty to stop at a place of danger, and if it does not
stop, it is liable for the consequences. In the present case, the
train was running at a high speed, and the engineer was
negligent in not stopping at the place of danger. The
court, therefore, holds that the railroad is liable for the
damages sustained by the plaintiff.

...and applied in the following cases; U. S. & M. E.
Co. v. Robinson, 130 Ill. 580; East St. Louis Ry. Co. v.
O'Brien, 130 Ill. 580; Peirce v. Walters, 130 Ill. 580; I. C.
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Co., 130 Ill. 580; Chicago Terminal R. Co. v. Kotowski,
130 Ill. 580; Chicago Terminal R. Co. v. Green, 130 Ill.
130; I. C. R. Co. v. Kitcher, 130 Ill. 580; K. C. R. Co.
v. Kitcher, 130 Ill. 580; P. W. G. & W. D. Ry. Co. v. Kitcher,
130 Ill. 580; Barlett v. Whelan R. Co., 130 Ill. 130.
The court's review of these authorities is that there runs
through them a common thread, namely, that a railroad train
has a duty to stop at a place of danger, and if it does not
stop, it is liable for the consequences. In the present case, the
train was running at a high speed, and the engineer was
negligent in not stopping at the place of danger. The
court, therefore, holds that the railroad is liable for the
damages sustained by the plaintiff.

was within 300 feet of the women, although he observed that they paid no attention to his signals; and when he was within 300 feet of them he shut off the power, put on the emergency brakes and blew the whistle frantically, for he realized then that they did not intend to get off the track; and that he ran 300 feet after he struck the woman before he could stop, or 600 feet after he applied the brake. He testified that the track was straight and level and that he saw the women ahead of him all the time during that 1000 feet. Appellant also called John L. Sullivan. He was a towerman for appellees and was on his way home after his day's work and was riding in the front vestibule with the motorman. He testified that he saw these women when they were about 1,000 feet ahead of him; that the motorman blew his whistle continuously and rang the bell and the women made no effort to get off the track, and that when the car was within 100 feet of them the motorman applied the emergency brake; that the witness distinctly saw the women walking on the track for 1000 feet ahead, and that neither she nor her companion looked around before the accident happened; and that in his opinion, the speed of the car was 25 or 30 miles per hour, and that the motorman stopped the car in 50 feet after he struck the woman or 150 feet after he began applying the emergency brake. In passing on the motion to direct a verdict on the evidence introduced by appellant it was the duty of the court to accept the testimony most favorable to appellant as true. Directing a verdict for appellees under these circumstances was equivalent to holding as a matter of law, that the motorman could drive the car so near these women that it would be impossible to stop before hitting them, without this act being wanton or wilful or in reckless disregard of human life, or that all reasonable

...again 200 feet at the women, although he observed that
that was an attempt at his signal; and when he was within
the space of about 100 feet, he saw the women
...and when the witness testified, that he realized
that the fact that he was intent to get off the street, and that
in 200 feet after he struck the woman before he could
stop, he was after he realized the mistake. He testified
that the woman was standing and looking at him and that he saw the
...of his all the time during that 200 feet.
...also called John L. Sullivan. He was a witness
...and was on his way home after his day's work
...in the front vestibule with the woman.
...that he saw three women when they were about
100 feet ahead of him; and the woman in the middle
...and went the bell and the woman made no effort
to get off the track, and that when the car was within
100 feet of them the woman realized the emergency brake;
that the witness distinctly saw the woman walking on the
track for 100 feet ahead, and that neither she nor her
...looked back before the accident happened; and
that in his opinion, the speed of the car was 10 or 20 miles
per hour, and that the witness stopped the car in the track
after the emergency brake was put on. He testified he had
...emergency brake. In walking on the track he
...a variety of the witness testimony by explaining
...of the fact that the emergency brake
...a variety of fact. Explaining a variety of fact
...these circumstances was explained in the
...of law, that the woman could not see the
...woman that it would be impossible to stop
...with the emergency brake, without this and other women in the
...of the all testimony, or that all testimony

minds would agree that the motorman did not wilfully
 wantonly or in reckless disregard of human life, but with
 due care, under the authorities above cited. The motorman
 did testify that until he was within 300 feet of them he
 thought that the women were going to get off, but he also
 testified that neither of the women showed any indications
 of having heard the signals. There were other railroad tracks
 immediately adjoining and parallel to the tracks operated
 by appellee, as the motorman well knew, and the women may
 not have realized that these signals were given from a
 car on appellee's railroad. We are of opinion that all
 reasonable minds would not agree that this motorman per-
 formed the duty which the law cast upon him after he discov-
 ered these people ahead of him and saw that they apparently
 did not hear his signals. It is to be considered also that
 this was not the case of a heavy engine and a heavy train of
 many cars upon a steam railroad, the speed of which it is
 very difficult to instantly reduce, but this was a ~~sign~~
 single car which could be stopped in from 150 to 300 feet.
 The jury were not bound to believe that the motorman did
 not realize the danger till he was within 300 feet of the
 women or that he was exercising reasonable care in not
 reaching that conclusion sooner under the circumstances.
 We are of opinion that the proof recited presented a ques-
 tion of fact which should first have been submitted to
 the jury. *Offnat v World's Colombian Exposition* 173 Ill. 474.

The judgment is reversed and the cause remanded.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the
Court, in and for said Second District of the State of Illinois, and keeper of
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set
seal of the said Appellate Court, at
of August, in the year of our Lor
dred and thirteen.

182

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| 1-25 | Hyatt Epton |
| 7/10/68 | L. SAMP |
| 10/1/68 | Richard F. Goss |
| 4/16/69 | J. Spahn |
| 4/16/69 | J. Spahn |
| 8/24/70 | Kirkman |
| 11/20/70 | Lindgren |
| 2-27-72 | Selo |
| 3-8-72 | James J. Beatz |
| 1-7-74 | B. Cohen |
| 2-14-75 | M. Geringel |
| 2-14-75 | J. Schwartz |
| 01-20-82 | D. Brown |
| | J. J. Scudgoph |
| | M. Pulogz |

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